



AGENDA
Committee of the Whole
Council Annual Training
Tuesday, February 2, 2016 (note date/time)
2:00 p.m. – 5:00 p.m.
City Council Conference Room, 10th Floor

Councilmember Judi Brown Clarke, Chair
Councilmember Jessica Yorko, Vice Chair

- 1. Call to Order**
- 2. Roll Call**
- 3. Public Comment on Agenda Items**
- 4. Presentations:**
 - I. Human Resources -Elizabeth Mayes (30 minutes)
 - II. City Attorney –Deputy City Attorney Abood (45 minutes)
 - III. Coaching/Consulting (Susan Combs)
- 5. Adjourn**

The City of Lansing's Mission is to ensure quality of life by:

- I. Promoting a vibrant, safe, healthy and inclusive community that provides opportunity for personal and economic growth for residents, businesses and visitors
- II. Securing short and long term financial stability through prudent management of city resources.
- III. Providing reliable, efficient and quality services that are responsive to the needs of residents and businesses.
- IV. Adopting sustainable practices that protect and enhance our cultural, natural and historical resources.
- V. Facilitating regional collaboration and connecting communities



MINUTES
Committee of the Whole
Tuesday, February 2, 2016 @ 2:00 p.m.
City Council Chambers

CALL TO ORDER

The meeting was called to order at 2:00 p.m.

PRESENT

Councilmember Brown Clarke
Councilmember Jessica Yorke
Councilmember Patricia Spitzley arrived at 2:10 p.m.
Councilmember Adam Hussain arrived at 2:08 p.m.
Councilmember Kathie Dunbar arrived at 2:08 p.m.
Councilmember Carol Wood left at 3:47 p.m.
Councilmember Jody Washington left at 3:15 p.m.
Councilmember Tina Houghton

OTHERS PRESENT

Sherrie Boak, Council Staff
Courtney Vincent, Council Administrative Assistant- arrived at 2:45 p.m.
Elizabeth Mayes, HR
Joseph Abood, Deputy City Attorney
Susan Combs

Public Comment

No public comment

Human Resources

Ms. Mayes outlined the City policy on sexual harassment policy and the group watched the video. Council President Brown Clarke asked for an update on the complaint submission process. This does include an option that if someone does not want to come forward with a formal complaint they can come to Human Resources. Council Member Washington asked if there is any legal obligation to report something, and Ms. Mayes reminded Council that they are Managers so should report it, and Mr. Abood added if they become aware of anything they should report it. Council Member Wood suggested that since City Council is the Manager of all the employees if they are notified, Council needs to contact the City Attorney for them to make the determination, and Mr. Abood agreed.

Ms. Mayes informed Council that once an investigation is done it will be given to the Mayor and the Office of the City Attorney. Council President Brown Clarke asked if the complaint is

against an employee can they use their union as representation. Ms. Mayes noted it would depend on the investigation, and HR would offer them their union steward as best practice. Council Member Washington asked if HR gets many complaints, and Ms. Mayes answered that they do not.

Council Member Wood asked how often the employees receive this training, and Ms. Mayes confirmed when they are hired, and as of recently they are preparing for annual trainings. Council President Brown Clarke asked if Council can do them every other year, since in 2017 there will not be any new Council Members, and Council Member Wood stated that in the past a Resolution was passed stating Council agreed to have the training annually.

Ms. Mayes confirmed for the Council that the policy was updated in 12/2015.

Council Member Spitzley asked for the practice for if there are issues amongst Council Members. Ms. Mayes directed all Council to the City Attorney office.

Council President Brown Clarke asked that in 2017 the HR Department provide examples, and Council Member Spitzley added that there should also be statistics provided.

City Attorney

Mr. Abood did not present any new documents but referred Council to the handout from 2015. Mr. Abood then gave an overview of the Law Department, confirming he has no government expertise therefore will address the basics, and there are specific questions, he will take note of those and get back to Council.

Mr. Abood moved onto an opinion of June 11, 2009 regarding disruptive speech. This document was not handed out and was to be provided after the meeting. The document outlined the need for clarity, confine the discussion to comments and address what is on the floor at hand. Mr. Abood then addressed decorum, and gave examples. This document too was not available for Council and was to be provided after the meeting. One example was that it was not inappropriate for Council to raise a point of order during a disruptive outburst by the public. The Council discussed examples of keeping to the business at hand, City related matters, and not addressing personal attacks that have nothing to do with City businesses. It was also commented that Council has a difficult view since they are public officials and the leeway is can be wide. Council Member Dunbar asked Mr. Abood if it is not City business and they stop it because it is crossing the line, is that appropriate. Mr. Abood confirmed the best procedure is for one Council Member to raise a point of order. Council President Brown Clarke asked what happens to the allowed time during the point of order. Mr. Abood instructed the clock should be stopped, and they still only get a total of three (3) minutes to speak. Council Member Dunbar reminded the Council that if a point of order is not recognized by the presiding President, then it takes 6 members to override the President/Chair.

The Council then discussed situations where during public comment other members of the public cheer or jeer the speaker. Council President Brown Clarke asked if under Freedom of Speech the Council can stop passive aggressive behavior. Mr. Abood noted that freedom of speech is a protective rights, and if it a repeated offense, it can be addressed on a case by case basis. Council Member Wood informed Mr. Abood that in the past if there were disruptions that the City Attorney would send a letter to that resident. Mr. Abood stated he would research at former City Attorney Brigham original interpretation, however would error towards the side of tolerance. Council Staff was directed to place the examples on "Decorum" at the Dais for each Council Member. There was an example of the public throwing items at Council, and Mr. Abood stated he would research that also.

The Committee spoke about past instances when someone from Council leaves the Dais area to go into the public to speak, and not being allowed. There were examples in the Law handout.

Council Member Yorko stepped away from the meeting at 3:15 p.m.
Council Member Washington left the meeting at 3:15 p.m.

Mr. Abood addressed the potential of a situation of a quorum of Council at a Committee meeting, confirming that if Council's intention is not to act, that would satisfy the open meetings act. Council wants to be careful that we do not talk on the record that could be business of Council, and if Council speaks that could be considered as deliberation. Council Member Wood noted she did not want to be in a situation where Council is not able to participate. Mr. Abood gave the example that if three members commit, and a 4th is present, they can speak with no vote. If a 5th member or more is present at a 3 member Committee only Committee members can speak and vote. Council Member Wood referenced past practice of posting as a Committee of the Whole, and Mr. Abood stated it could be noticed as such. Law recommendation would be that best practice would be to not allow 5 or more Council members are present. Council Member Dunbar asked about situation where it is a neighborhood event but 5 members are in attendance. Mr. Abood confirmed that if they are there, and do not deliberate, act or speak on City business nor it is a City function, they are not acting in their official authority. Therefore this is not a violation of the open meetings act. During public events where they are speaking or presenting a Tribute, and there are a quorum present, Mr. Abood stated they should not state "on behalf of the City". Council Member Spitzley suggested they error on the side of caution.

Council Member Yorko returned to the meeting at 3:23 p.m.

Council President Brown Clarke asked that Law research the intent of representing the Council, and propose recommended scripted language, this would address the best way to make Council less vulnerable.

Council Member Wood asked about minutes taken at joint meetings such as BWL and Committee of the Whole. The Council staff takes minutes, however it has been stated that BWL does not because it is not a meeting. Mr. Abood stated he would speak to the BWL attorney and find out why they do not.

Council President Brown Clarke asked about updating the Charter and Ordinances on items that are obsolete. Council Member Wood stated Council can review it every ten (10) years.

Council Member Dunbar stepped away from the meeting at 3:32 p.m.

Council Member Yorko asked if changes can be made without a Charter Commission. Council Member Wood stated there is a cost for the Charter Commission, sometime \$100,000, which covers outside counsel, staff, etc. Mr. Abood stated that the Office of the City Attorney will review any specifics, however if there are grammatical errors there should be a methodical practice to fix them. Council Member Wood suggested they look at the last minutes of the Charter Commission to understand their intent.

Mr. Abood informed the Committee that Law is still reviewing and working on the Council Rules that were presented in the Committee on General Services.

Council President Brown Clarke asked if Council will be receiving information that City Attorney Ms. McIntyre is formally on leave. Mr. Abood stated he could not provide that and it should be from the Administration, and he cannot advise Council on administrative

procedures. Council President Brown Clarke also asked that the City Attorney Office provide information on the realignment of the Law office so that Council is aware of who will staff their Committees. Mr. Abood stated the City Attorney office is short staffed, but he is committed to have a City Attorney at all Committee meetings.

Council Member Dunbar returned to the meeting at 3:37 p.m.

Council President Brown Clarke asked for an update on the protocol when communicating with the City Attorney office for information. Mr. Abood stated all communications should be addressed to the Attorney staffing the Committee, then c.c. Ms. McIntyre, Mr. Abood and Ms. Maison. Council President Brown Clarke asked Ms. Mayes with HR if Ms. McIntyre is on leave should she be c.c. on emails since she is not active, and Ms. Mayes confirmed that she should still be c.c. on communications.

Council Member Spitzley informed Mr. Abood that Council has a list of items they are waiting on and the response has always been "they have not been signed off by the City Attorney". What is the status of all those items and does everything come to a halt while the City Attorney Ms. McIntyre is out or is there an Interim City Attorney. Mr. Abood noted that in order to address issues that are outstanding, and so the Law office can move along on things, at some point in time sooner or later, a list of those issues should be made and sent to law with a c.c. to Ms. McIntyre, Mr. Abood, and Mr. Dotson to make sure items get addressed. Council President Brown Clarke asked again for the proper protocol. Mr. Abood agreed the Council has the right to know her status and who is acting and/or interim City Attorney.

Council Member Wood asked for the status of the Human Rights Ordinance review. Mr. Abood stated he is waiting on comments from Council Member Dunbar, and reminded Council Member Wood he had until February 8th. Council Member Wood asked that this document be sent to the Chair and Council Staff. Council Member Wood did question that if Law sends back a version to the Committee and they confirm, is law ready to sign off on it or is the Committee being told at this time, until Ms. McIntyre is back and able to sign off, the Ordinance cannot move forward. Mr. Abood stated that Ms. McIntyre or her designee would however right now there is no clarification of the designee. Council Member Spitzley asked Mr. Abood if all Council business is at a halt until there is an acting City Attorney. Mr. Abood clarified it was not, they have been able to get the authority from Ms. McIntyre on certain things. Council President Brown Clarke again asked that Mr. Abood provide the understanding of who is interim since Ms. McIntyre is on leave and not in an active role, and also provide what is protocol. Mr. Abood asked that Council address all communications to the attorney staffing their Committee, c.c. Mr. Abood and Ms. McIntyre. Council President Brown Clarke asked Mr. Abood to provide formal notice. Council Member Wood asked if something will come from Law on the interim, or if Mr. Abood has to ask the Mayor's office to appoint an interim. Council President Brown Clarke asked Ms. Mayes with HR, if a department head is on leave, who releases that information, would that be HR or administration. Ms. Mayes was asked to inform Council on this so that they can move forward.

Council Member Wood left the meeting at 3:47 p.m.

Mr. Abood moved onto the training handout.

Coaching/Consulting

Council President Brown Clarke introduced Ms. Combs. Ms. Combs gave a brief overview on the *Everything DISC Workplace* assessment tool that all Council and Council staff performed prior to the meeting. The assessment outlined the four basic styles of "Dominance", "Influence", "Conscientiousness" and "Steadiness". The Committee then noted on the white

board where all their assessments place them, and they then discussed amongst themselves what they can do to work with each other's profiles.

Other

Council Member Spitzley affirmed her concern with lack of a City Attorney and City business coming to a halt, and asked at what point is something done. Council President Brown Clarke noted that there is no active role of leadership and also there is no designation of Committee assignments from the City Attorney Office. A memo from the Council President should be sent to the Mayor for the clarification purpose of the request on record.

ADJOURN

The meeting was adjourned at 4:45 p.m.

Respectfully Submitted by,
Sherrie Boak, Recording Secretary
Lansing City Council

Approved by the Committee on February 22, 2016

AGENDA
COUNCIL TRAINING 2015
AUGUST 12, 2015

1. FOIA – Recent changes and adoption of policies and procedures.
2. OMA
 - a. Recent cases of interest.
 - b. Confidentiality in closed sessions
3. Council Rules and Procedures
 - a. Recent changes to rules
 - b. Decorum/Civility
 - c. Contracting and spending
4. Key Provisions of the City Charter
5. Ethics
6. Parliamentary Procedure

**FREEDOM OF
INFORMATION ACT
POLICIES AND
PROCEDURES**

CITY OF LANSING

FOIA PROCEDURES AND GUIDELINES¹

Preamble: Statement of Principles

It is the policy of the City of Lansing (hereinafter, "City" or "Lansing") that all persons, except those incarcerated, consistent with the Michigan Freedom of Information Act (FOIA), are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people shall be informed so that they fully participate in the democratic process.

The City's policy with respect to FOIA requests is to comply with State law in all respects and to respond to FOIA requests in a consistent, fair, and even-handed manner regardless of who makes such a request.

The City acknowledges that it has a legal obligation to disclose all nonexempt public records in its possession pursuant to a FOIA request. The City acknowledges that sometimes it is necessary to invoke the exemptions identified under FOIA in order to ensure the effective operation of government and to protect the privacy of individuals.

The City will protect the public's interest in disclosure, while balancing the requirement to withhold or redact portions of certain records. The City's policy is to disclose public records consistent with and in compliance with State law.

The City has established the following written procedures and guidelines to implement the FOIA and will create a written public summary of the specific procedures and guidelines relevant to the general public regarding how to submit written requests to the public body and explaining how to understand a public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal. The written public summary will be written in a manner so as to be easily understood by the general public.

As used herein, "City" or "City of Lansing" includes all agencies, departments, and boards of the City.

Section 1: General Policies

The City, acting pursuant to the authority at MCL 15.236, designates the Chief Deputy City Attorney as the FOIA Coordinator for the City. He or she is authorized to designate others to act on his or her behalf to accept and process written requests for the City's public records and approve denials.

If a request for a public record is received by fax or email, the request is deemed to have been received on the following business day. If a request is sent by email and delivered to a City spam or junk-mail folder, the request is not deemed received until one day after the FOIA Coordinator first becomes aware of the request. The FOIA Coordinator shall note in the FOIA log both the date the request was delivered to the spam or junk-mail folder and the date the FOIA Coordinator became aware of the request.

The FOIA Coordinator may, in his or her discretion, implement administrative rules, consistent with State law and these Procedures and Guidelines to administer the acceptance and processing of FOIA requests.

The City is not obligated to create a new public record or make a compilation or summary of information which does not already exist. The FOIA Coordinator shall keep a copy of all written requests for public records received by the City on file for a period of at least one year.

The City will make this Procedures and Guidelines document and the Written Public Summary publicly available without charge. A copy of this Procedures and Guidelines document and the City's Written Public Summary

must be publicly available by providing free copies both in the City's response to a written request and upon request by visitors at the Office of the City Clerk, Office of the City Attorney, the Board of Water and Light, and at the Lansing Police Department Central Records. This Procedures and Guidelines document and the City's Written Public Summary will be maintained on the City's website at www.lansingmi.gov, as well as at www.lbwl.org, so a link to those documents will be provided in lieu of providing paper copies when possible.

Section 2: Requesting a Public Record

A person requesting to inspect or obtain copies of public records prepared, owned, used, possessed, or retained by the City must do so in writing. A request must sufficiently describe a public record so as to enable City personnel to identify and find the requested public record. No specific form to submit a request for a public record is required. However the FOIA Coordinator may make available a FOIA Request Form for use by the public.

Requests for LPD incident reports, accident, and traffic crash reports should be directed to LPD at the below address. Reports for Lansing Board of Water and Light records should be directed to the BWL at the below address. All other requests should be directed to the Office of the City Attorney.

Written requests for public records may be submitted in person or by mail, fax, or email to the FOIA Coordinator the following addresses:

For LPD report requests:
FOIA COORDINATOR
Records Division
120 W. Michigan Avenue, 1st Floor
Lansing, MI 48993
Email: LPD.FOIA@lansingmi.gov
Fax: 517/483-

For all other requests:
FOIA COORDINATOR
Office of the City Attorney
124 W. Michigan Avenue, 5th Floor
Lansing, MI 48893
Email: FOIA.Request@lansingmi.gov
Fax: 517/483-4018

For Board of Water & Light record requests:

FOIA COORDINATOR
Lansing Board of Water and Light
PO Box 13007
Lansing, MI 48901-3007
Email: FOIARequests@lbwl.com
Fax: 517-702-6743

Upon their receipt or discovery, requests for public records misdirected shall be promptly forwarded to the appropriate FOIA Coordinator for processing.

A person may request that public records be provided on non-paper physical media, emailed or other otherwise provided to him or her in digital form in lieu of paper copies. The City will comply with the request only if it possesses the necessary technological capability to provide records in the requested non-paper physical media format.

A person may subscribe to future issues of public records that are created, issued or disseminated by the City on a regular basis. A subscription is valid for up to 6 months and may be renewed by the subscriber.

A person serving a sentence of imprisonment in a local, state or federal correctional facility is not entitled to submit a request for a public record. The FOIA Coordinator will deny all such requests.

Section 3: Processing a Request

Unless otherwise agreed to in writing by the person making the request, the City will issue a response within 5 business days of receipt of a FOIA request. If a request is received by fax, email or other electronic transmission, the request is deemed to have been received on the following business day.

The City will respond to a request in one of the following ways:

- Grant the request.
- Issue a written notice denying the request.
- Grant the request in part and issue a written notice denying in part the request.
- Issue a notice indicating that due to the nature of the request the City needs an additional 10 business days to respond for a total of no more than 15 business days. Only one such extension is permitted.
- Issue a written notice indicating that the public record requested is available at no charge on the City's website.

When a request is granted:

If the request is granted, or granted in part, the FOIA Coordinator will require that payment be made in full for the allowable fees associated with responding to the request before the public record is made available. The FOIA Coordinator shall provide a detailed itemization of the allowable costs incurred to process the request to the person making the request. A copy of these Procedures and Guidelines and the Written Public Summary will be provided to the requestor free of charge with the response to a written request for public records, provided however, that because these Procedures and Guidelines, and the Written Public Summary are maintained on the City's website at www.lansingmi.gov, a link to the Procedures and Guidelines and the Written Public Summary may be provided in lieu of providing paper copies of those documents.

If the cost of processing a FOIA request is \$50 or less, the requestor will be notified of the amount due and where the documents can be obtained.

If the cost of processing a FOIA request is expected to exceed \$50 based on a good-faith calculation, or if the requestor has not paid in full for a previously granted request, the City will require a good-faith deposit pursuant to Section 4 of this policy before processing the request. In making the request for a good-faith deposit the FOIA Coordinator shall provide the requestor with a detailed itemization of the allowable costs estimated to be incurred by the City to process the request and also provide a best efforts estimate of a time frame it will take the City to provide the records to the requestor. The best efforts estimate shall be nonbinding on the City, but will be made in good faith and will strive to be reasonably accurate, given the nature of the request in the particular instance, so as to provide the requested records in a manner based on the public policy expressed by Section 1 of the FOIA.

When a request is denied or denied in part:

If the request is denied or denied in part, the FOIA Coordinator will issue a Notice of Denial which shall provide in the applicable circumstance:

- An explanation as to why a requested public record is exempt from disclosure; or
- A certificate that the requested record does not exist under the name or description provided by the requestor, or another name reasonably known by the City; or

- An explanation or description of the public record or information within a public record that is separated or deleted from the public record; and
- An explanation of the person's right to submit an appeal of the denial to the President of City Council, or seek judicial review in the Ingham County Circuit Court;
- An explanation of the right to receive attorneys' fees, costs, and disbursements as well as actual or compensatory damages, and punitive damages of \$1,000, should they prevail in Circuit Court.
- The Notice of Denial shall be signed by the FOIA Coordinator.

If a request does not sufficiently describe a public record, the FOIA Coordinator may, in lieu of issuing a Notice of Denial indicating that the request is deficient, seek clarification or amendment of the request by the person making the request. Any clarification or amendment will be considered a new request subject to the timelines described in this Section.

Requests to inspect public records:

The City shall provide reasonable facilities and opportunities for persons to examine and inspect public records during normal business hours. The FOIA Coordinator is authorized to promulgate rules regulating the manner in which records may be viewed so as to protect City records from loss, alteration, mutilation or destruction and to prevent excessive interference with normal City operations. Requests for examination and inspection are subject to fees as provided by the Act.

Section 4: Fee Deposits

If the fee estimate is expected to exceed \$50.00 based on a good-faith calculation, the requestor will be asked to provide a deposit not exceeding one-half of the total estimated fee.

If a request for public records is from a person who has not paid the City in full for copies of public records made in fulfillment of a previously granted written request, the FOIA Coordinator will require a deposit of 100% of the estimated processing fee before beginning to search for a public record for any subsequent written request by that person when all of the following conditions exist:

- The final fee for the prior written request is not more than 105% of the estimated fee;
- The public records made available contained the information sought in the prior written request and remain in the City's possession;
- The public records were made available to the individual, subject to payment, within the time frame estimated by the City to provide the records;
- Ninety (90) days have passed since the FOIA Coordinator notified the individual in writing that the public records were available for pickup or mailing;
- The individual is unable to show proof of prior payment to the City; and
- The FOIA Coordinator has calculated a detailed itemization that is the basis for the current written request's increased estimated fee deposit.

The FOIA Coordinator will not require an increased estimated fee deposit if any of the following apply:

- The person making the request is able to show proof of prior payment in full to the City;
- The City is subsequently paid in full for the applicable prior written request; or
- Three hundred sixty five (365) days have passed since the person made the request for which full payment was not remitted to the City.

Section 5: Calculation of Fees

A fee will *not* be charged for the labor cost of search, examination, review and the deletion and separation of exempt from nonexempt information *unless* failure to charge a fee would result in unreasonably high costs to the City because of the nature of the request in the particular instance, and the City specifically identifies the nature of the unreasonably high costs.

Costs for the search, examination review, and deletion and separation of exempt from non-exempt information are “unreasonably high” when they are excessive and beyond the normal or usual amount for those services (Attorney General Opinion 7083 of 2001) compared to the costs of the City’s usual FOIA requests, not compared to the City’s operating budget. (*Bloch v. Davison Community Schools*, Michigan Court of Appeals, Unpublished, April 26, 2011).

The following factors shall be used to determine an unreasonably high cost to the City:

- Volume of the public record requested
- Amount of time spent to search for, examine, review and separate exempt from non-exempt information in the record requested.
- Whether the public records are from more than one City department or whether various City offices are necessary to respond to the request.
- The available staffing to respond to the request.
- Any other similar factors identified by the FOIA Coordinator in responding to the particular request.

The City may charge for the following costs associated with processing a request:

- Labor costs associated with copying or duplication, which includes making paper copies, making digital copies, or transferring digital public records to non-paper physical media or through the Internet.
- Labor costs associated with searching for, locating and examining a requested public record.
- Labor costs associated with a review of a record to separate and delete information exempt from disclosure.
- The cost of copying or duplication, not including labor, of paper copies of public records. This may include the cost for copies of records already on the City’s website if the requestor asks for the City to make copies.
- The cost of computer discs, computer tapes or other digital or similar media when the requestor asks for records in non-paper physical media. This may include the cost for copies of records already on the City’s website if the requestor asks for the City to make copies.
- The cost to mail or send a public record to a requestor.

Labor costs will be calculated based on the following requirements:

- All labor costs will be estimated and charged in 15-minute increments, with all partial time increments rounded down.
- Labor costs will be charged at the hourly wage of the lowest-paid City employee capable of doing the work in the specific fee category, regardless of who actually performs work.
- The City may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits, but in no case may it exceed the actual cost of fringe benefits.
- Overtime wages will not be included in labor costs unless agreed to by the requestor; overtime costs will not be used to calculate the fringe benefit cost.

The cost to provide records on non-paper physical media when so requested will be based on the following requirements:

- Computer disks, computer tapes or other digital or similar media will be at the actual and most reasonably economical cost for the non-paper media.
- This cost will only be assessed if the City has the technological capability necessary to provide the public record in the requested non-paper physical media format.
- The City will procure any non-paper media and will not accept media from the requestor in order to ensure integrity of the City's technology infrastructure.

The cost to provide paper copies of records will be based on the following requirements:

- Paper copies of public records made on standard letter (8 ½ x 11) or legal (8 ½ x 14) sized paper will not exceed \$.10 per sheet of paper. Copies for non-standard sized sheets of paper will reflect the actual cost of reproduction.
- The City may provide records using double-sided printing, if it is cost-saving and available.

The cost to mail records to a requestor will be based on the following requirements:

- The actual cost to mail public records using a reasonably economical and justified means.
- The City may charge for the least expensive form of postal delivery confirmation.
- No cost will be made for expedited shipping or insurance unless specified by the requestor.

If the FOIA Coordinator does not respond to a written request in a timely manner, the City must:

- Reduce the labor costs by 5% for each day the City exceeds the time permitted under FOIA up to a 50% maximum reduction, if *any* of the following applies:
 - The City's late response was willful and intentional,
 - The written request conveyed a request for information within the first 250 words of the body of a letter facsimile, email or email attachment, or
 - The written request included the words, characters, or abbreviations for "freedom of information," "information," "FOIA," "copy" or a recognizable misspelling of such, or legal code reference to MCL 15. 231, et seq. or 1976 Public Act 442 on the front of an envelope or in the subject line of an email, letter or facsimile cover page.
- Fully note the charge reduction in the Detailed Itemization of Costs Form.

Section 6: Waiver of Fees

The cost of the search for and copying of a public record may be waived or reduced if in the sole judgment of the FOIA Coordinator a waiver or reduced fee is in the public interest because it can be considered as primarily benefitting the general public.

Section 7: Discounted Fees

Indigence

The FOIA Coordinator will discount the first \$20.00 of the processing fee for a request if the person requesting a public record submits an affidavit stating that they are:

- Indigent and receiving specific public assistance, or

- If not receiving public assistance, stating facts demonstrating an inability to pay because of indigence.

An individual is not eligible to receive the waiver if:

- The requestor has previously received discounted copies of public records from the City twice during the calendar year; or
- The requestor requests information in connection with other persons who are offering or providing payment to make the request.

An affidavit is a sworn statement. The FOIA Coordinator may make a Fee Waiver Affidavit Form available for use by the public.

Nonprofit organization advocating for developmentally disabled or mentally ill individuals

The FOIA Coordinator will discount the first \$20.00 of the processing fee for a request from:

- A nonprofit organization formally designated by the state to carry out activities under subtitle C of the federal developmental disabilities assistance and bill of rights act of 2000, Public Law 106-402, and the protection and advocacy for individuals with mental illness act, Public Law 99-319, or their successors, if the request meets all of the following requirements:
 - Is made directly on behalf of the organization or its clients.
 - Is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the mental health code, 1974 PA 258, MCL 330.1931.
 - Is accompanied by documentation of its designation by the state, if requested by the public body.

Section 8: Appeal of a Denial of a Public Record

When a requestor believes that all or a portion of a public record has not been disclosed or has been improperly exempted from disclosure, he or she may appeal to the President of City Council by filing an appeal of the denial with the FOIA Coordinator. The appeal must be in writing, specifically state the word "appeal" and identify the reason or reasons the requestor is seeking a reversal of the denial.

Within 10 business days of receiving the appeal the President of City council will respond in writing by:

- Reversing the disclosure denial;
- Upholding the disclosure denial; or
- Reverse the disclosure denial in part and uphold the disclosure denial in part; or
- Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the President of City Council shall respond to the written appeal. The President of City council shall not issue more than 1 notice of extension for a particular written appeal.

If the President of City Council fails to respond to a written appeal, or if the President of City Council upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action in Ingham County Circuit Court.

Whether or not a requestor submitted an appeal of a denial to the President of City Council, he or she may file a civil action in Ingham County Circuit Court within 180 days after the City's final determination to deny the request.

If a court determines a public record is not exempt from disclosure, it shall order the City to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Failure to comply with an order of the court may be punished as contempt of court.

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in such an action, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or City prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements.

If the court determines that the City has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the City to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

Section 9: Appeal of an Excessive FOIA Processing Fee

"Fee" means the total fee or any component of the total fee calculated under section 4 of the FOIA, including any deposit.

If a requestor believes that the fee charged by the City to process a FOIA request exceeds the amount permitted by state law or under this policy, he or she must first appeal to the President of City Council by submitting a written appeal for a fee reduction to the FOIA Coordinator.

The appeal must be in writing, specifically state the word "appeal" and identify how the required fee exceeds the amount permitted.

Within 10 business days after receiving the appeal, the President of City Council will respond in writing by:

- Waiving the fee;
- Reducing the fee and issuing a written determination indicating the specific basis that supports the remaining fee;
- Upholding the fee and issuing a written determination indicating the specific basis that supports the required fee; or
- Issuing a notice detailing the reason or reasons for extending for not more than 10 business days the period during which the President of City Council will respond to the written appeal. The President of City Council shall not issue more than 1 notice of extension for a particular written appeal.

Where the President of City Council reduces or upholds the fee, the determination must include a certification from the President of City Council that the statements in the determination are accurate and that the reduced fee amount complies with its publicly available procedures and guidelines and Section 4 of the FOIA.

Within 45 days after receiving notice of the President of City Council's determination of an appeal, the requesting person may commence a civil action in Ingham County Circuit Court for a fee reduction. If a civil action is commenced against the City for an excess fee, the City is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute. An action shall not be filed in circuit court unless one of the following applies:

- The President of City Council failed to respond to a written appeal as required, or
- The President of City Council issued a determination to a written appeal.

If a court determines that the City required a fee that exceeds the amount permitted under its publicly available procedures and guidelines or Section 4 of the FOIA, the court shall reduce the fee to a permissible amount. Failure to comply with an order of the court may be punished as contempt of court.

If the requesting person prevails in court by receiving a reduction of 50% or more of the total fee, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages.

If the court determines that the City has arbitrarily and capriciously violated the FOIA by charging an excessive fee, the court shall order the City to pay a civil fine of \$500.00, which shall be deposited in the general fund of the state treasury. The court may also award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the fee reduction. The fine and any damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

Section 10: Conflict with Prior FOIA Policies and Procedures; Effective Date

To the extent that these Procedures and Guidelines conflict with previous FOIA policies promulgated by the City, these Procedures and Guidelines are controlling. To the extent that any administrative rule promulgated by the FOIA Coordinator subsequent to the adoption of this resolution is found to be in conflict with any previous policy promulgated by the City, the administrative rule promulgated by the FOIA Coordinator is controlling.

To the extent that any provision of these Procedures and Guidelines or any administrative rule promulgated by the FOIA Coordinator pertaining to the release of public records is found to be in conflict with any State statute, the applicable statute shall control. The FOIA Coordinator is authorized to modify this policy and all previous policies adopted by the City, and the Written Public Summary, and to adopt Cost Worksheet(s) and administrative rules as he or she may deem necessary, to facilitate the legal review and processing of requests for public records made pursuant to Michigan's FOIA statute, provided that such modifications and rules are consistent with State law. The FOIA Coordinator shall inform the mayor and City Council of any changes to these Procedures and Guidelines or Written Public Summary.

These FOIA Policies and Guidelines become effective July 1, 2015.

Section 11: Additional Internal FOIA Procedures

I. TRAINING.

A. Consistent with longstanding OCA practice, all FOIA Personnel shall receive continuous and comprehensive FOIA training, including written certification thereof.

B. The training shall include, at a minimum:

1. Preliminary training before being designated as a FOIA Coordinator or Officer, including support staff, which shall include knowledge of and proficiency with:

a. The Act;

- b. Leading cases and AG opinions under the Act;
 - c. FOIA Guidelines and Procedures.
- 2. All FOIA Personnel shall receive continuing legal education and training, including:
 - a. Annual participation in seminars focusing on FOIA, including the Institute for Continuing Legal Education (ICLE), the Michigan Municipal League (MML)/Michigan Association of Municipal Attorneys (MAMA), and other providers of such training;
 - b. Subscription to the MML's listserv, including especially threads and updates on FOIA decisions and issues, which are then circulated to the group;
 - c. Review and discussion of FOIA in OCA staff meetings, led by Chief Deputy City Attorney/FOIA Coordinator, including:
 - (i) All significant incoming advance sheets, court decisions, and AG opinions on FOIA issues;
 - (ii) Circulation such materials to all FOIA Personnel, along with analysis and application of those materials;
 - d. Interoffice memoranda to FOIA Personnel regarding updates on FOIA issues, cases, policies, and procedures.

II. FOIA REQUEST RECEIVED.

- A. Date stamp request when received (faxed requests do not need to be stamped; date is at top of fax copy).
- B. As soon as possible, but not later than the day after receipt, transmit the request to coordinating assistant.
- C. Coordinating assistant logs FOIA request on computerized log sheet:
 - 1. "Due out" date computed (5 working days after receipt; electronically received requests are logged in on the next day's date.).
 - 2. Print copy of updated log sheet for file.
 - 3. Determine departments to forward request to.

III. REQUEST RECORDS FROM APPLICABLE DEPARTMENT(S).

- A. Prepare request cover memo to department(s).
- B. Make copies and deliver hard or electronic copy to department where applicable records are retained.
- C. Keep the original request and a copy of the cover memo for OCA records.

IV. TRACKING AND EXTENSION NOTICE.

- A. Track request so that it is responded to according to the time frames established in the Act.
- B. If the request requires a voluminous amount of records to be copied or records are being requested of several departments, it may be necessary to send a notice of extension.

C. The extension notice is sent out on the first "due date" and extends the period for response an additional 10 business days.

V. RECEIPT AND REVIEW OF RECORDS REQUESTED AND RESPONSE.

A. RECEIPT AND REVIEW.

1. Once all documents/records are received, the assigned FOIA coordinator will review records for compliance with request and for any information which may need to be redacted due to applicable exemptions.
2. When review is complete, the coordinating assistant will determine costs (utilizing the cost worksheet) and the assigned FOIA coordinator will prepare cover letter to requestor.
3. Submit letter of response and copies to assigned attorney for review and signature.

B. RESPONSE: FOIA personnel will respond consistently with these Guidelines and Procedures.

VI. PROCEDURAL AND SUBSTANTIVE SAFEGUARDS PRIOR TO RESPONSE.

A. PROCEDURAL SAFEGUARDS.

1. Are all Social Security Numbers redacted?
2. Are all redactions illegible in production copy, including production of a copy of the redacted document instead of the original?
3. For law enforcement matters:
 - a. Is information properly redacted to prevent disclosure of confidential source or information?
 - b. Is information properly redacted to prevent disclosure of other exempted information?
 - (i) Identity of informant?
 - (ii) Identity of undercover officer, agent, or plain clothes officer?
 - (iii) Personal address or telephone number of active or retired law enforcement officers or their special skills?
 - (iv) Name, address, or telephone numbers of family members, relatives, children, or parents of active or retired law enforcement officers or agents?
 - (v) Operational instructions for law enforcement officers or agents?
 - (vi) Contents of staff manuals provided for law enforcement officers or agents?
 - (vii) Danger to the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies?
 - (viii) Identity of person as a law enforcement officer, agent, or informant?
 - (ix) Personnel records of law enforcement agencies?
 - (x) Identity of residences that law enforcement agencies are requested to check in the absence of their owners or tenants?

4. For criminal prosecutions in which denial is based on pending investigation, has status of case been confirmed with ICPO?

B. SUBSTANTIVE SAFEGUARDS.

1. Have all exemptions been considered?
2. Where an exemption is claimed, has sufficient explanation been given?
3. For personnel matters, does response comply with Bullard-Plawicki?
4. Have privacy concerns been adequately addressed?
 - a. Has information covered by Health Insurance Portability Accountability Act of 1996 (HIPAA) been redacted?
 - b. Has information covered by the Public Health Code, 1978 PA 368, especially as codified at MCL 333.1531, been redacted?
 - c. Has information covered by the Mental Health Code, 1974 PA 258, especially as codified at MCL 330.1748, been redacted?
 - d. If not covered by HIPAA, the Public Health Code, or the Mental Health Code, has medical information been appropriately redacted, including especially a person's actual or alleged HIV status?
 - e. Have appropriate redactions been made for "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy," MCL 243(1)(a)?

VII. FINALIZATION PROCEDURES.

- A. Mark FOIA log with date out, whether it was released or denied, and costs, if any.
- B. File packet in monthly folder in FOIA file cabinet.
- C. File billing sheet (copy of cover letter of released records) in FOIA receivables folder in FOIA file cabinet.

VIII. FOIA PAYMENT RECEIVED.

- A. When a check for payment of a FOIA request is received, these are the steps that should be taken in recording and processing the payment:
 1. Date stamp the cover letter and/or check.
 2. Hold checks until there are 3-5 of them to process.
 3. Pull the copy of the original cover letter (which serves as an invoice) from the "FOIA Receivables" file folder.

4. Mark the FOIA log with date received and check number.
5. Copy "invoice" cover letters to attach to receipt.
6. Prepare receipts.
7. Attach copy of "invoice" letter to receipt book.
8. Prepare deposit slip.
9. Give deposit slip and checks to 2nd person to take down to Treasurer's for deposit.
10. Prepare envelopes for mailing receipts.
11. File "invoice" copies in "FOIA payments rec'd" file folder.
12. Get yellow copy of deposit slip back from 2nd person (after deposit with Treasurer) and file with other slips.

ⁱ Sections 1-10 of these Procedures and Guidelines are adapted from those promulgated by the Michigan Township Association and the Michigan Association of Municipal Attorneys.

OMA

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Higgs v. Houston-Philpot

Court of Appeals of Michigan April 17, 2012 Not Reported in N.W.2d 2012 WL 1314104 (Approx. 5 pages)

2012 WL 1314104

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.

Kim A. HIGGS, Plaintiff-Appellant,

v.

Kimberly HOUSTON-PHILPOT and Delta College Board of Trustees,
Defendants-Appellees.

Docket No. 302767. April 17, 2012.

Bay Circuit Court; LC No. 10-003559-CZ.

Before: FORT HOOD, P.J., and CAVANAGH and K.F. KELLY, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right an order denying his motion for summary disposition and granting defendants' motion for summary disposition in this declaratory judgment action. We affirm.

Plaintiff is a member of the Delta College Board of Trustees and is an attorney. He filed this lawsuit against the Delta College Board of Trustees, as well as a co-trustee, alleging, in relevant part, a violation of the Open Meetings Act (OMA) because he was interrupted while speaking during the public comment segment of a public budget meeting. He claimed that, although he was a member of that public body, he had the right to speak as a member of the general public during the public comment segment of the meeting. Plaintiff further alleged that he was entitled to the due process protections afforded by the Michigan Constitution, Art 1, § 17, with regard to an investigation initiated by the Delta College Board of Trustees that was based on its conflict of interest policy. Plaintiff claimed that he would not receive a fair and impartial hearing from his co-trustees in light of his filing of, and involvement in, several lawsuits against Delta College and/or the Delta College Board of Trustees. Eventually plaintiff filed a motion for summary disposition under MCR 2.116(C)(10) with regard to these claims.

Defendants responded to plaintiff's motion and also moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendants argued that the OMA was not violated because plaintiff was permitted to speak during the public comment segment of the subject meeting and he completed his comments as evidenced by the transcript of that meeting. Defendants also argued that plaintiff was not entitled to the protections set forth in Art 1, § 17 of the Michigan Constitution with regard to the conflict of interest investigation. Defendants asserted that plaintiff did not allege any infringement on his constitutional rights to life, liberty, or property as a consequence of the conflict of interest policy; thus, the due process clause was not applicable.

Following oral arguments on the cross-motions for summary disposition, the trial court rendered its written opinion and order granting defendants' motion and denying plaintiff's motion. The trial court held that the OMA was not violated because plaintiff was allowed to speak during the public comment segment of the budget meeting. Thus, the claim was without merit and was dismissed. The court further held that plaintiff's right to due process was not violated by the conflict of interest policy because a constitutionally protected interest was not at stake. Accordingly, plaintiff's case was dismissed in its entirety. This appeal followed.

First, plaintiff argues that the trial court erroneously concluded that MCL 15.263(5) of the OMA was not violated because he was denied his right to speak during the public comment segment of the subject budget meeting. After de novo review of the court's decision on this motion for summary disposition, and considering whether a genuine issue of material fact

SELECTED TOPICS

Counties

Fiscal Management, Public Debt, and Securities

City Council Open Public Meeting

Secondary Sources

§ 167.Effect of failure to comply

18 Mich. Civ. Jur. Municipal Corporations § 167

...All decisions of a public body are presumed to have been adopted in compliance with the Open Meetings Act (MCLA 15.261 to 15.275). If a public body is not in compliance with the Act, the attorney gener...

Validity, construction, and application of statutes making public proceedings open to the public

38 A.L.R.3d 1070 (Originally published in 1971)

...This annotation collects and analyzes the cases which have discussed the validity, construction, and application of those statutes which provide, in effect, that meetings of public entities are to be o...

§ 166.Minutes

18 Mich. Civ. Jur. Municipal Corporations § 166

...The minutes of each meeting under the Open Meetings Act, including those of closed sessions, must be kept and, with the exception of those taken during a closed session, be made available for public in...

See More Secondary Sources

Briefs

Brief for the Interstate Commerce Commission

1932 WL 33546

I.C.C. v. Oregon-Washington R. & Nav. Co. Supreme Court of the United States. October 27, 1932

...The opinion of the specially constituted District Court (R. 155), Oregon-Washington R. & Nav. Co. v. United States, is reported at 47 F. (2d) 250. The report of the Interstate Commerce Commission (R. 5...

Amicus Curiae Brief of Common Cause in Michigan and ACLU Fund of Michigan on the Open Meetings Act Issue

1993 WL 13154995

BOOTH NEWSPAPERS, INC., d/b/a the Ann Arbor News, and the Detroit Free Press, Inc., Plaintiffs-Appellees, Cross-Appellants, v. THE BOARD OF RECENTS OF THE UNIVERSITY OF MICHIGAN, Defendant-Appellant, Cross-Appellee. Supreme Court of Michigan. March 04, 1993

...Common Cause in Michigan is part of a national nonprofit, nonpartisan citizens' lobby of 250,000 members nationwide and 7,000 members in Michigan which works to improve the openness and accountability ...

Brief for the Public Utilities Commissioner of Oregon and Public Utilities Commission of the State of Idaho

1932 WL 33547

I.C.C. v. Oregon-Washington R. & Nav. Co. Supreme Court of the United States. October 05, 1932

...The opinion of the specially constituted District Court granting the prayer for an

existed, we disagree. See MCR 2.116(C)(10); *Coblentz v. City of Novi*, 475 Mich. 558, 567–568; 719 NW2d 73 (2006).

*2 Plaintiff claims that he had the right to speak during the public comment segment of the budget meeting and that right was denied because he was interrupted during the course of his comments. Pursuant to MCL 15.263(5) of the OMA, “[a] person shall be permitted to address a meeting of a public body under rules established and recorded by the public body.” Here, it is clear from the transcript of the hearing that plaintiff did, in fact, address the Delta College Board of Trustees during the public comment segment of the meeting and was not prevented from making and completing his comments. Thus, we agree with the trial court that the OMA was not violated and summary disposition of this claim was proper.

Plaintiff also argues that the trial court abused its discretion when it failed to enter a declaratory judgment in his favor with regard to his right to speak during the public comment segment of future Delta College Board of Trustees’ budget hearings. We disagree.

The trial court did not grant or deny plaintiff’s request for a declaratory judgment apparently because plaintiff’s asserted right was not violated; thus, the trial court did not exercise its discretion with regard to this issue. As defendants argue in their brief on appeal, an actual controversy must exist to invoke declaratory relief. See MCR 2.605. An actual controversy does not exist where the injury sought to be prevented is hypothetical. *Shavers v. Attorney General*, 402 Mich. 554, 589; 267 NW2d 72 (1978). Here, plaintiff’s claim is based on his speculation as to how the Delta College Board of Trustees will act in the future. In the absence of an actual controversy, the trial court lacked subject-matter jurisdiction to enter a declaratory judgment. See *McGill v. Auto. Ass’n. of MI*, 207 Mich.App 402, 407; 526 NW2d 12 (1994).

Further, although plaintiff has asserted that he has the legal right to address the “public body” during the public comment segment of its meetings—just as members of the general public may address the public body—he fails to provide persuasive rationale to support this claimed right. Plaintiff was a member of the public body that he wished to address as “a member of the general public.” That fact distinguishes this case from all of the cases plaintiff cites in support of his argument; in fact, he has failed to cite a single factually similar case and we could not find one.

The purpose of the OMA “is to promote governmental accountability by facilitating public access to official decision making, and to provide a means through which the general public may better understand issues and decisions of public concern.” *Manning v. City of East Tawas*, 234 Mich.App 244, 250; 593 NW2d 649 (1999). Stated another way, “[t]he primary purpose of the OMA is to ensure that public entities conduct all their decision-making activities in open meetings and not simply hold open meetings where they rubber-stamp decisions that were previously made behind closed doors.” *Schmiedicke v. Clare School Board*, 228 Mich.App 259, 264; 577 NW2d 706 (1998). We fail to see how the purpose of the OMA is achieved when individual members of the public body are permitted to present their personal disagreements about the decision-making of the public body to which they are a member during the public comment segment of the meeting. Every member of a public body is also a member of the general public. We do not believe that MCL 15.263(5) was intended to provide such a forum or to promote such objectives. And, here, there was a particular time set forth in the agenda that permitted members of the Delta College Board of Trustees to speak. There was also a procedure in place by which a member of the Delta College Board of Trustees could attempt to have an issue added to the agenda; however, plaintiff apparently did not utilize these options. In any case, we have significant reservations as to whether MCL 15.263(5) entitled plaintiff to address the “public body” in which he was a member during the public comment segment of a meeting, but we need not decide this issue here because plaintiff was permitted to make his comments.

*3 Next, plaintiff argues that the trial court erroneously concluded that he was not entitled to the due process protections afforded by Art 1, § 17 of the Michigan Constitution with regard to defendants’ investigation of his alleged violation of the Delta College conflict of interest policy. After de novo review of this constitutional issue and the court’s decision on this motion for summary disposition, we disagree. See *Coblentz*, 475 Mich. at 567–568; *Kampf v. Kampf*, 237 Mich.App 377, 381; 603 NW2d 295 (1999).

The Michigan Constitution guarantees that persons may not be deprived of life, liberty, or property without due process of law. Const 1963, art 1, § 17; *Hanlon v. Civil Service Comm.*, 253 Mich.App 710, 722; 660 NW2d 74 (2002). “Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights

injunction (155) is reported in 47 F. (2d) 250. The report of the Interstate Commerce Commission is published in 159 L...

See More Briefs

Trial Court Documents

Hoff v. Spoelstra

2005 WL 5989167
Hoff v. Spoelstra
Circuit Court of Michigan, Marquette County
August 04, 2005

...At a session of said Court held in the Courthouse in the City of Houghton, Houghton County, Michigan on the 25 Day of July, 2005, Present: HONORABLE GARFIELD W. HOOD, Chief Circuit Judge, Assigned Thl...

Morrison v. City of East Lansing

2001 WL 36169548
Morrison v. City of East Lansing
Circuit Court of Michigan, Ingham County
April 16, 2001

...PRESENT: HONORABLE WILLIAM E. COLLETTE, Circuit Judge This matter comes before the Court on the parties motion for summary disposition pursuant to MCR 2.116 (A). Oral argument was heard on March 28, 200...

Kenneth MORRISON, Susan Burke, Nicole Ellefson, Kenneth Frank, Jacqueline Campbell, Kenneth Carlisle, Charles Pearl, Stephen Elliston, Angela Elliston, Phillip Wickersham, Mary Wickersham, David Stowe, Linda White, Mark Kielhorn, Margot Kielhorn, Rochelle Witteplegeon, Linda Fletcher, and Citizens to Keep Hannah Green, Inc., Plaintiffs, v. CITY OF EAST LANSING and the City Council for the City of East Lansing, Defendants.

2001 WL 36033874
Kenneth MORRISON, Susan Burke, Nicole Ellefson, Kenneth Frank, Jacqueline Campbell, Kenneth Carlisle, Charles Pearl, Stephen Elliston, Angela Elliston, Phillip Wickersham, Mary Wickersham, David Stowe, Linda White, Mark Kielhorn, Margot Kielhorn, Rochelle Witteplegeon, Linda Fletcher, and Citizens to Keep Hannah Green, Inc., Plaintiffs, v. CITY OF EAST LANSING and the City Council for the City of East Lansing, Defendants.
Circuit Court of Michigan, Ingham County
April 16, 2001

...PRESENT: HONORABLE WILLIAM E. COLLETTE, Circuit Judge This matter comes before the Court on the parties motion for summary disposition pursuant to MCR 2.116 (A). Oral argument was heard on March 28, 200...

See More Trial Court Documents

protected by due process, such as life, liberty, or property." *Kampf*, 237 Mich.App at 382 (citations omitted). Thus, a threshold requirement to a procedural due process claim is the demonstration that the plaintiff has a liberty or property interest protected by the Constitution. *Mettler Walloon, LLC v. Melrose Twp.*, 281 Mich.App 184, 209; 761 NW2d 293 (2008) (citation omitted). A protected property interest exists where an individual has a legitimate claim of entitlement deriving from existing rules or understandings that stem from an independent source such as state law; a unilateral expectation to the claimed interest is insufficient. *Williams v. Hofley Mfg. Co.*, 430 Mich. 603, 610; 424 NW2d 278 (1988); *Mettler Walloon*, 281 Mich.App at 209.

Here, plaintiff appears to claim that defendants' investigation of his alleged violation of the Delta College conflict of interest policy constituted state action which entitled him to procedural due process protections because his position as a member of the Delta College Board of Trustees constituted a protected property interest. However, plaintiff has failed to establish that his membership on the Delta College Board of Trustees constituted a protected property interest. That is, plaintiff has not directed us to an independent source, such as state law, that created such a property interest. The law in Michigan is well-settled that persons holding public office do not have a property right in that position.

A public office cannot be called 'property,' within the meaning of these constitutional provisions (United States Constitution, Fifth Amendment-due process, and Fourteenth Amendment-equal protection of law). If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. [*Detroit v. Division 26 of Amalgamated Ass'n. of Street, Electric R. & Motor Coach Employees of America*, 332 Mich. 237, 251; 51 NW2d 228 (1952), quoting *Attorney General v. Jochim*, 99 Mich. 358, 367; 58 NW 611 (1894).]

*4 Michigan law is consistent with federal law in this regard.¹ The United States Supreme Court has explained that "public offices are mere agencies or trusts, and not property as such" and that "the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." *Taylor v. Beckham*, 178 U.S. 548, 577; 20 S Ct 890; 44 L Ed 1187 (1900); see, also, *Snowden v. Hughes*, 321 U.S. 1, 7; 64 S Ct 397; 88 L Ed 497 (1944) (reaffirming the holding of *Taylor*). Thus, plaintiff's claim that his membership on the Delta College Board of Trustees constitutes a protected property interest is without merit.

Plaintiff also appears to argue that even if he did not have a protected property interest we should hold that he was entitled to a "fair and impartial hearing" with regard to the subject investigation. Plaintiff confusingly claims that the trial court erred in "confining [its] analysis to simply constitutional considerations" and refers us to the "common law" as providing support for his asserted right. However, the cases relied upon by plaintiff involve either constitutional due process claims or are inapposite. For example, plaintiff relies on *Tumey v. State of Ohio*, 273 U.S. 510; 47 S Ct 437; 71 L Ed 749 (1927), but the issue in that case was whether the accused was denied his constitutional right to due process. Plaintiff relies on *Peninsular R. Co. v. Howard*, 20 Mich. 18 (1870), but that case involved a property condemnation proceeding that violated due process rights. Plaintiff also refers us to *People v. Overysse Twp. Board*, 11 Mich. 222 (1863), but that case involved self-dealing in violation of fiduciary duties, which is not at issue here. Plaintiff also cites to *Crampton v. Michigan Dep't. of State*, 395 Mich. 347; 235 NW2d 352 (1975), but that case involved a driver's license revocation proceeding that violated due process rights. Plaintiff further cites to *Spratt v. Dep't. of Social Services*, 169 Mich.App 693; 426 NW2d 780 (1988), but that case involved the denial of a welfare claim in violation of due process rights. And plaintiff relies on *Vaylar v. Vic Tanny Int'l.*, 114 Mich.App 388; 319 NW2d 338 (1982), but that case involved the denial of due process rights with regard to workers' compensation benefits. Accordingly, plaintiff's assertion that this "common law" supports his position is without merit.

Plaintiff also argues that he should be entitled to hearing procedures like those set forth in the Administrative Procedures Act, MCL 24.201 *et seq.*, as well as for claimed violations of the Standards of Conduct for Public Officers and Employees, MCL 15.341 *et seq.* However, the Delta College Board of Trustees is not an administrative "agency" as defined by MCL 24.203(2), and plaintiff is not a "public officer" as defined by MCL 15.341(c). Thus, the hearing procedures set forth in these statutory provisions simply do not apply under the circumstances presented in this case and provide no support for his claim.

*5 In summary, plaintiff has failed to establish that his membership on the Delta College Board of Trustees constituted a protected property interest entitling him to the due process protections provided by Art 1, § 17 of the Michigan Constitution with regard to defendants' investigation of his alleged violation of the Delta College conflict of interest policy.

Affirmed. Defendants are entitled to costs as prevailing parties. See MCR 7.219(A).

All Citations

Not Reported in N.W.2d, 2012 WL 1314104

Footnotes

- 1 The Michigan Constitution does not provide greater protection than the federal due process guarantee; thus, federal precedent may aid our analysis. *English v. BCBSM*, 263 Mich.App 449, 459; 688 NW2d 523 (2004).

End of Document

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Filas v. Dearborn Heights School Dist. 7

Court of Appeals of Michigan. April 16, 2013. Not Reported in N.W.2d. 2013 WL 1629427 (Approx. 6 pages)

2013 WL 1629427

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.

Tamara FILAS, Plaintiff-Appellant,

v.

DEARBORN HEIGHTS SCHOOL DISTRICT 7, Jeffrey Bartold, Charlene Coulson, Dearborn Heights Board of Education, Cindy Desmit, Mandy Diroff, Lori Fujita, Christine Kowalski, David Mack, Angela Rudolph, Phillip Shannon, Virginia Morgan, and Denise Rafferty, Defendants
-Appellees.

Docket No. 308395. April 16, 2013.

Wayne Circuit Court; LC No. 11-002576-CZ.

Before: BORRELLO, P.J., and K.F. KELLY and GLEICHER, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right a trial court order granting defendants' motion for summary disposition. For the reasons set forth in this opinion, we affirm.

I. FACTS & PROCEDURAL HISTORY

Plaintiff is a tenured teacher in the Dearborn Heights School District No. 7 (the School District) where she teaches geometry. Plaintiff is presently on leave. Sometime after plaintiff was hired, she was involved in a car accident. Plaintiff alleged that this accident caused her to develop sensitivity to fluorescent lights and to loud noises. At or about the start of the 2010 academic year, plaintiff began wearing "lightly-tinted" prescription glasses, custom hearing protection in loud areas such as hallways, and she brought a bench to her classroom so that she could lay down on it and rest when students were not present. According to plaintiff, her students engaged in conduct designed to create loud noises. Plaintiff responded to the conduct by giving an "informational" audiology presentation to her class. Plaintiff also provided a handout that contained information on the anatomy of a human ear. The handout included language that stated that any action deemed as deliberate to cause plaintiff pain or injury could "be subject to punishment," and "may constitute a wrongful act." The handout stated that "[k]nowingly and deliberately causing pain and/or bodily harm to any individual can be the basis of a legal action in a court of law against the person or persons responsible."

In addition to the handout, plaintiff gave her students a "disciplinary contract" to take home, review with their parents, sign and return. The contract included language that required the student to acknowledge that "I understand that if I deliberately create sounds that cause pain or irreversible harm to another person's hearing, I may be held accountable." The parents needed to agree that their child understood, "there will be serious consequences for behavior that causes pain or damage to anyone's hearing." Plaintiff did not obtain permission from the School District to give the presentation or to provide the handouts. In an affidavit, Charlene Coulson, assistant superintendent, averred that numerous students and parents complained to the District and perceived the contract as a threat to sue noisy students.

After receiving the complaints, Superintendent Jeffrey Bartold, Coulson and a union representative met with plaintiff. The administration asked plaintiff "to provide medical information to substantiate your need for a daybed in your classroom and for any additional accommodations you may need based on your serious headaches, vision issues and hearing issues." Plaintiff was placed on paid administrative leave pending "investigation of the contract and other actions surrounding the behaviors in the classroom."

SELECTED TOPICS

Adverse Personnel Actions

Teacher Appeal of School Board Decision

Secondary Sources

§ 141.Termination for economic reasons; reinstatement

22 Mich. Civ. Jur. Schools and Education § 141

...The notice provision in the Teachers' Tenure Act is not applicable to a probationary teacher whose contract is discontinued purely as a result of economic conditions. Therefore, a contract provision au...

§ 142.Dismissal; demotion, generally

22 Mich. Civ. Jur. Schools and Education § 142

...The Teachers' Tenure Act places restrictions concerning the discharge of teachers on local boards, but it does not deprive local boards of their statutory administrative control over teachers. However,...

Cause of Action to Challenge Discharge of Public School Teacher on Grounds of Incompetence

21 Causes of Action 423 (Originally published in 1990)

...This article discusses actions challenging the discharge of public school teachers on grounds of incompetence. Since a similar action may also be brought to challenge the discharge of other public scho...

See More Secondary Sources

Briefs**Petition**

1985 WL 694651
Shuba v. Austintown Bd. Educ.
Supreme Court of the United States.
September 16, 1985

...The parties below were Petitioner, Kathryn Shuba, Appellant in the Supreme Court of Ohio and Respondent, Austintown Local School District Board of Education, Appellee in the Supreme Court of Ohio. The ...

Joint Appendix

1997 WL 33487265
BOARD OF EDUCATION of the Township of Piscataway, Petitioner, v. Sharon TAXMAN, Respondent.
Supreme Court of the United States.
August 25, 1997

...MICHAEL CHERTOFF United States Attorney for the District of New Jersey
SUSAN CASSELL Deputy Chief, Civil Division Peter Rodino Federal Building 970 Broad Street Newark, N.J. 07102 (201) 621-2944 SC 808...

Respondent's Brief in Opposition

1996 WL 33439711
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, Petitioner, v. Sharon TAXMAN, Respondent.
Supreme Court of the United States.
December 02, 1996

...Whether a local school board with an admittedly racially diverse workforce can, consistent with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the New Jersey Law ...

See More Briefs

Trial Court Documents

On November 29, 2010, plaintiff forwarded medical documentation to the School District; however, the School District concluded that the documentation did not show that plaintiff needed "reasonable accommodation" to perform her job. Plaintiff was informed that, pursuant to the School District's Collective Bargaining Agreement (CBA), the superintendent would recommend to the Board of Education (the Board) that plaintiff undergo a physical and/or mental examination. Plaintiff was informed that she could ask that the Board consider the recommendation in a closed session in accord with the Open Meetings Act (OMA), MCL 15.261, *et seq.*; however, plaintiff did not request a closed session.

*2 The Board considered the superintendent's recommendation at a December 6, 2010, meeting. Item XIII on the Meeting Agenda was entitled "Executive Session," and Item XV was entitled "Board Action on Complaint Against Staff Member." The meeting minutes stated that after about an hour, a Board member moved to have the Board go into executive session, "and pursuant to Section 8h of the [OMA] to consider material exempt from disclosure under statute." Approximately two hours later, the Board reconvened in an open session and unanimously passed Resolution # 10-154 authorizing the superintendent to require a "staff member" (i.e. plaintiff) to take a "physical and/or mental examination" at the School District's expense. The Board indicated, "[t]he staff member's name and infraction(s) are designated in executive session meeting minutes...."

Following the meeting, the School District gave plaintiff the opportunity to provide revised medical documentation to verify that she needed accommodations to perform her job. Ultimately, plaintiff submitted additional documentation, but she did not comply with the School District's directives to attend a meeting with the administration to discuss her return to work. Instead, plaintiff requested to be placed on voluntary medical leave. The School District complied. Thereafter, the School District attempted on several occasions to arrange a meeting with plaintiff to discuss her return to the classroom for the 2011 academic year, to no avail. The School District informed plaintiff that she was on "unauthorized, unpaid leave of absence," and had exhausted her allowance of sick days and leave under the FMLA. Plaintiff has remained on leave ever since.

Meanwhile, on March 3, 2011, plaintiff commenced this action. In her complaint, plaintiff made references to the Teacher Tenure Act (TTA), MCL 38.71 *et seq.*, and alleged three decipherable counts. In Count 1, plaintiff alleged a violation of the Freedom of Information Act (FOIA)¹, MCL 15.231 *et seq.*, and in Counts II-IV, plaintiff alleged violations of the OMA. Specifically, plaintiff alleged that defendants violated MCL 15.268(a) of the OMA, which provides that a public body may meet in closed session to consider complaints against a public employee "if the named person requests a closed hearing."

Defendants moved for summary disposition, arguing that the Board properly went into closed session under the OMA pursuant to MCL 15.268(h), which allows a public body to meet in closed session "[t]o consider material exempt from discussion or disclosure by state or federal statute." Defendants argued that the Board discussed plaintiff's medical condition, which was exempt from disclosure under state and federal law under the Americans With Disabilities Act (ADA), 42 USC 12101 *et seq.*, FOIA, and the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq.* In addition, defendants argued that student complaints considered by the Board were educational records that could not be disclosed under the Family Educational Rights and Privacy Act (FERPA), 20 USC 1232g.

*3 The trial court granted defendants' motion for summary disposition with respect to the TTA claims pursuant to MCR 2.116(C)(8) and (C)(10), and it granted defendants' motion with respect to the OMA claims pursuant to MCR 2.116(C)(10). The court held that, "[t]here can be no violation of the [TTA] when no action has been taken under it," and it found that the Board properly went into closed session to discuss plaintiff's medical condition. This appeal ensued.

II. ANALYSIS

Plaintiff contends that the trial court erred in granting defendants' motion for summary disposition. "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 NW2d 817 (1999). In reviewing a motion brought under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v. Brown*, 478 Mich. 545, 551-552; 739 NW2d 313 (2007). A moving party is entitled to summary disposition under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* at 552. A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim based upon the pleadings alone.

Kiefer v. Markley

2007 WL 3237466
Kiefer v. Markley
Circuit Court of Michigan, Washtenaw County
September 04, 2007

...At a session of this Court held in the Washtenaw County Courthouse in the City of Ann Arbor on the 4th day of September, 2007. This matter is before the Court on Defendant's motion in limine to strike ...

The People of the State of Michigan v. Gavin

2000 WL 35721883
The People of the State of Michigan v. Gavin
Circuit Court of Michigan, Lake County
October 18, 2000

...On March 8, 2000 William Thomas Abernathy Jr. and his younger brother Joseph Lee Abernathy were shot outside the residence of Defendant at 414 East Sandusky, Idlewild, Michigan. A girlfriend of William...

People of the State of Michigan v. Jackson

2007 WL 7270039
People of the State of Michigan v. Jackson
Circuit Court of Michigan, Wayne County
April 05, 2007

...At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this: April 05 2007 PRESENT: Hon. Mary Beth Kelly Chief Judge The Court being advised in th...

See More Trial Court Documents

Malden, 461 Mich. at 119. The motion should be granted when a plaintiff's claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation omitted).

Plaintiff's argument with respect to the TTA is grounded on MCL 38.112, which, at the time plaintiff filed her complaint,² provided that a controlling board could place a tenured teacher on unrequested leave of absence "because of physical or mental disability," provided that the teacher "shall have the right to a hearing" under MCL 38.104(1). MCL 38.104(1), in turn, provides that a teacher "may contest the controlling board's decision to proceed upon the charges" by filing an appeal with the State Tenure Commission. Plaintiff argues that she was denied her right to a hearing with the Tenure Commission because the superintendent, as opposed to the Board, placed her on unrequested leave. She claims that because a "controlling board" did not place her on leave or consider formal "charges" against her, she could not obtain the right to a hearing under MCL 38.104(1).

In this case, plaintiff incorrectly contends that she could not obtain a right to a hearing under MCL 38.104(1). Here, while the superintendent initially placed plaintiff on paid administrative leave, the Board essentially affirmed that act at the Board meeting when it approved the superintendent's recommendation that plaintiff submit to a medical evaluation. Once the Board acted, plaintiff could have appealed that decision to the Tenure Commission and obtained her hearing pursuant to MCL 38.104(1). While no formal charges were filed against plaintiff, she could have nevertheless appealed the Board's actions and obtained a hearing under MCL 38.104(1) where she could have contested the ordered medical examination and the unrequested leave. This Court has previously noted that the Tenure Commission has broad authority to implement and enforce the TTA. See *Kramer v. Van Dyke Public Schools*, 134 Mich.App 479, 488; 351 NW2d 572 (1984) ("[t]he State Tenure Commission has jurisdiction over questions arising under the teachers' tenure act"); see also MCL 38.137 (providing that the Tenure Commission is "vested with such powers as are necessary to carry out and enforce the provisions of [the TTA]"); MCL 38.121 (providing that a tenured teacher "may appeal to the tenure commission *any decision of a controlling board under this act*, other than a decision governed by article IV....") (Emphasis added). Indeed, plaintiff's failure to appeal to the Tenure Commission and exhaust her administrative remedies is fatal to any claims she may have raised under the TTA. See MCL 38.104(7) (once a tenured teacher is aggrieved by a final decision of the Tenure Commission, the teacher may seek judicial review of the decision).

*4 Moreover, even if we were to assume that plaintiff for some reason could not file a claim with the Tenure Commission, plaintiff is not entitled to any relief under the TTA. Here, plaintiff is not presently on "unrequested" leave. Instead, plaintiff asked to be placed on voluntary medical leave less than a month after the Board approved the superintendent's recommendation. By making this request, plaintiff converted the "unrequested" leave of absence to a requested leave of absence. Therefore, all of her arguments relating to being placed on unrequested leave are moot and she is not entitled to any relief.

For these reasons, the trial court did not err in granting defendants' motion for summary disposition with respect to plaintiff's TTA claims.³ See *Hess v. Cannon Twp.*, 265 Mich.App 582, 596; 696 NW2d 742 (2005) (this Court will affirm a trial court when it reaches the right result albeit for different reasons).

Plaintiff next contends that the trial court erred when it concluded that defendants did not violate the OMA.

MCL 15.268 provides two exceptions to the general rule that all meetings of a public body must be conducted in an open session⁴ in relevant part as follows:

A public body may meet in a closed session only for the following purposes:

(a) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against ... a public ... employee ... *if the named person requests a closed hearing....* [Emphasis added.]

(h) To consider material exempt from discussion or disclosure by state or federal statute.

Plaintiff contends that the Board considered complaints against her at the December 6, 2010, meeting, that she did not request a closed session, and that the Board therefore violated subsection (8)(a) when it went into closed session. Defendants counter that the

Board properly went into closed session under 8(h) because it considered material exempt from disclosure-i.e. plaintiff's medical condition and student complaints.

In this case, before the Board meeting, the School District made medical inquiries of plaintiff that were considered by the Board and were exempt from disclosure under 29 CFR 1630.14 (c)(1), a regulation governing implementation of the ADA. That regulation provides in relevant part as follows:

(c) Examination of employees. A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee *shall be* collected and maintained on separate forms and in separate medical files and be *treated as a confidential medical record....* [29 CFR 1630.14 (emphasis added).]

Here, the School District is a "covered entity" for purposes of the ADA. See 29 CFR 1630.2 (b) (defining "covered entity" to include an "employer"). Additionally, the School District made medical "inquiries" of plaintiff and plaintiff responded to those inquiries. Specifically, plaintiff forwarded information from health professionals to the School District regarding her medical conditions per the School District's inquiry. Hence, the information was confidential and exempt from disclosure under 29 CFR 1630.14(c)(1). Furthermore, the responses to the inquiries were necessarily related to the Board's discussions at the meeting. Coulson informed plaintiff that the inadequacy of the responses precipitated the superintendent's decision to recommend that plaintiff undergo a mental and/or physical examination. Thus, the Board necessarily had to consider the responses to the inquiries in deciding whether to approve the superintendent's recommendation. Therefore, given that such information was exempt from disclosure, the Board had authority to go into closed session pursuant to MCL 15.268(h).

*5 In addition, plaintiff's medical information was exempt from disclosure under MCL 15.24 (1)(l), which exempts from disclosure "[m]edical, counseling or psychological facts or evaluations concerning an individual" if consideration of the information would reveal the individual's identity. Here, the Board considered medical or psychological facts or evaluations during the Board meeting. Plaintiff submitted letters from medical professionals detailing her medical ailments. Plaintiff had a lengthy medical history at the school after she was involved in a car accident. It was necessary for the Board to consider and discuss all of these facts and circumstances in evaluating the superintendent's recommendation. The Board could not have conducted its inquiry in public without revealing plaintiff's identity. As such, the material was exempt from disclosure under MCL 15.243(1)(l), and the Board was therefore authorized to go into closed session to discuss the material pursuant to MCL 15.268(h).⁵

Plaintiff contends that the Board was not authorized to go into closed session because the Board considered "complaints" against her. However, even if the Board considered "complaints" against plaintiff, the complaints were inextricably linked to plaintiff's medical condition, information of which was not subject to disclosure. To the extent any complaints against plaintiff were considered, the Board needed to consider all of the facts and circumstances surrounding the superintendent's recommendation that plaintiff undergo a medical examination. Moreover, the decision that came out of the Board meeting was that plaintiff had to submit to a medical evaluation, which is indicative that the Board discussed any complaints or infractions solely in the context of plaintiff's medical condition. In other words, the complaints were only relevant to the Board's determination that plaintiff should take a medical examination. The Board did not consider the complaints for any other purpose as the ultimate outcome of the hearing did not precipitate the filing of disciplinary charges against plaintiff.

In sum, plaintiff's medical information was protected material that was exempt from disclosure under the ADA and FOIA, consideration of which was necessary to allow the Board to decide whether to approve the superintendent's recommendation that plaintiff undergo a physical and/or mental evaluation. Moreover, the protected material was inextricably linked to any complaints against plaintiff that the Board considered. Accordingly, the Board was authorized to go into closed session under MCL 15.268(h) and the trial court did not err in granting defendants' motion for summary disposition with respect to plaintiff's claims under the OMA. MCR 2.116(C)(10).

Affirmed. Neither party having fully prevailed, neither may tax costs. MCR 7.219(A).

All Citations

Not Reported in N.W.2d, 2013 WL 1629427

Footnotes

- 1 Plaintiff's FOIA claims are not at issue in this appeal.
- 2 The statute was subsequently amended by 2011 PA 100, effective July 19, 2011.
- 3 Given our resolution of plaintiff's arguments with respect to the TTA, we need not address her argument that the CBA was inconsistent with the TTA.
- 4 See MCL 15.263(1).
- 5 Defendants also contend that medical information was exempt from disclosure under HIPAA and student complaints were exempt under FERPA, 20 USC 1232g; however, because defendants fail to cite to specific relevant provisions of those statutes and otherwise fail provide any meaningful analysis in support of their arguments, they have abandoned them for review. See *Wiley v. Henry Ford Cottage Hosp*, 257 Mich.App 488, 499; 668 NW2d 402 (2003) ("[a]n appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position").

End of Document

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DECORUM

1. Call to order (that speaker is out of order)

“Mr./Ms. ____, please confine your comments to City business and not personal attacks.”

2. Warn (will declare out of order if don't stop)

“Mr./Ms. ____, if you do not stop these personal attacks, I will call you out of order.”

3. Declare out of order and direct you to leave the podium.

(Gavel) “Mr./Ms. ____, you are out of order. You must stop talking and leave the podium.

4. Upon refusal, request Sgt. at Arms to remove.

**PROPER
MUNICIPAL
EXPENDITURES**

STATE OF MICHIGAN
RICK SNYDER, Governor
DEPARTMENT OF TREASURY

Andy Dillon
State Treasurer



**AUDIT MANUAL
FOR LOCAL UNITS
OF GOVERNMENT
IN MICHIGAN**

APPENDIX H

PLANNING THE COMPLIANCE PORTION OF AN AUDIT

Restrictions on Local Government Expenditures

Local units of government in Michigan are only allowed to incur expenditures for a valid public purpose. The local unit is the steward of public resources, and they may not be used for a private purpose. Determining whether an expenditure is for a valid public purpose is a legal consideration. Often the local unit's legal counsel can be helpful in making this determination. There are numerous state statutes, court cases and attorney general opinions that define allowable expenditures. As a guide, the following is a list of the more common types of questionable expenditures:

1. Charitable Donations to Non-Profit Organizations: Unless the payment is in exchange for the provision of a governmental service that the local unit could have provided itself, this is not a valid public purpose. In general, such expenditures should be documented through a written agreement. This prohibition includes churches, veterans' organizations, community organizations, Little League, Boy Scouts, Big brothers/ Big Sisters, etc.
2. Donations to a Private Ambulance or EMS Service: MCL 333.20948 authorizes local governmental units to contract for ambulance services. This would only be allowed if there is a written agreement providing that the payment is in consideration for services rendered (which service the local unit could have provided with its own employees).
3. Public Celebrations and Events: MCL 123.851 specifically allows cities, villages and townships to expend money for observances of Armistice (Veterans), Independence and Memorial Days and Diamond Jubilee or Centennial celebrations. MCL 46.11a specifically allows counties to appropriate money for the celebration of Armistice (Veterans) Day.

It is improper for a unit of government to expend public money for an annual picnic or other celebration that is not specifically authorized by law and does not serve a public purpose. The Michigan Supreme Court in *Wayne County v Hathcock*, 471 Mich 445, 462; 684 NW2d 765 (2004), defined "public purpose" as having "for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose."

4. Providing Coffee, Food, etc.: The purchase of coffee, food, etc., must be for a public, not an individual or private group or purpose. These expenditures for use at a regular or special meeting where the public is also participating in the coffee, food, etc., for fire fighters, volunteer or full-time employees, when working an extended period of time or when dedicating public buildings are normally considered expenditures for a public purpose.

Coffee, food, etc., for employees use during normal working hours is considered personal, not for a public purpose, and improper unless specifically provided for in a collective bargaining agreement or duly adopted employment policy of the governmental unit (fringe benefit). See the definition of "public purpose" in item 3 above.

APPENDIX H

PLANNING THE COMPLIANCE PORTION OF AN AUDIT

5. Retirement/Recognition Functions and Employee and Retiree Gifts: Retirement functions, gifts or plaques for employees or officials, recognition dinners for volunteer fire fighters or ambulance staff are usually not for a public purpose, therefore, not an allowable expense. Travel and meals as part of the cost of training volunteers to perform emergency services within the local unit are deemed a public purpose, payable as an expense when properly budgeted, authorized and approved. See the definition of "public purpose" in item 3 above.
6. Historical Activities: MCL 399.161 allows a township to appropriate money that the township board believes advances and fosters historical interests of the township. MCL 399.171 and 399.172 allow a city, county, township or village to individually appropriate money or jointly create a commission to advance the historical interests of the unit or units. MCL 399.201-399.215 allow a city, county, township or village to establish historical districts and a commission to preserve and refurbish historical structures.
7. Juvenile Delinquency--Youth Centers: MCL 123.461 allows a county, city, township or village to operate centers open exclusively to youths under 21 years of age and aimed at curbing juvenile delinquency within the community.
8. Economic Development: MCL 125.1601-125.1636 allows a county, city, village or township to incorporate an economic development corporation, file articles of incorporation and fund projects of said EDC, which are for a public benefit. MCL 125.1231 - 125.1237 allows county commissioners to create a county commission to promote economic development and provide in the county budget for the expenses of the commission.
9. Senior Citizens, Older Persons: MCL 400.571 - 400.577 allows a county, township, city or village to provide services to persons 60 years or older. Appropriations to a private organization must be specified in a contract. The terms of the contract must be published within 10 days of its approval in a local newspaper specifying the contract terms and services to be performed.
10. Legal Expenses: A governmental unit is not authorized to expend public money to assist residents with legal costs in defending the homeowners from possible civil action by a neighboring city to condemn their property for public use by the city. We are unable to see a "public purpose" for the township in this expenditure. Also this expenditure may be prohibited under the provisions of Article 9, Section 18 of the 1963 Michigan Constitution that prevents a governmental unit from lending its credit to the aid of any person, association or corporation, public or private, except as authorized in the Constitution.
11. Membership Dues: Membership dues to governmental associations such as MTA, MML, MAC and similar organizations that advise, inform and educate officials and employees are appropriate. (See court decision *Hayes v City of Kalamazoo*, 316 Mich. 443).
12. Training and Education: Registration fees, lodging, travel, and meals while in attendance at useful public informational or educational workshops and seminars are appropriate.

May a Michigan city/village spend funds on flowers for an employee's funeral, for birthday cakes, for employee gifts, or retirement parties?

Generally, a municipality's power to spend money is derived from the state through the Michigan Constitution and state laws. In addition to specific grants of power, cities and villages with home rule authority are also able to rely on the applicable provisions in the Constitution and statutes for the power to spend on municipal concerns. Regardless of the authority, it is generally held, however, that municipalities have the power to expend funds only for a public purpose. One test for determining a public purpose is whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public. It should be noted that the public purpose test has also been limited to the provision of services for which municipalities exist and the powers they have authority to exercise.

With respect to the question raised, neither the Michigan Constitution nor state law grants to municipalities the power to spend public money on employee parties, gifts, etc. Nor can a good argument be made that the expenditures are for a public purpose. Absent a grant of spending authority, and no clear public purpose defined, the expenditure is most likely illegal. Simply put, a municipality cannot give public funds away.

May the city/village purchase and distribute candy for children and fruit baskets for senior citizens at holiday time?

First of all, there is no authority granted by the Michigan Constitution or by statute to make the gifts in question. Nor can a public purpose be identified by virtue of the gifts under Michigan law.

May a Michigan city/village make a charitable donation, gift or contribution to service clubs, charities or public or private social service agencies?

Generally, no. Such expenditures have been held not to be used for a public purpose. Even if the expenditure benefits the public incidentally, the expenditure may be nonetheless invalid if the appropriation is not under control of the city/village. However, MCL 117.3 indicates that the charters of home rule cities shall provide for the public peace, health and safety of persons and property. Specifically, a home rule city may contract with a private organization or another governmental unit for services considered necessary by the legislative body. Operation of child guidance and community mental health clinics; prevention, counseling and treatment of developmental disabilities; and drug abuse prevention, counseling and treatment are indicated to be services for public peace, health and safety. MML has prepared a reference packet on the issue which includes Department of Treasury materials.

May a Michigan city/village fund a fireworks display or pay for holiday celebrations?

A Michigan statute specifically grants municipalities the power to spend money on these celebrations. If the local celebration is for armistice, independence, memorial days, diamond jubilee or centennial the city may appropriate money for the purpose of defraying the expense of the celebration (see MCL 123.851).

ETHICS



Chris Swope
Lansing City Clerk

Elected and Appointed Officers
City of Lansing Michigan

Dear Elected and Appointed Officers:

Each year all elected and appointed officers of the City of Lansing and the Lansing Board of Water and Light are required by ordinance to make this statement of financial interests disclosure to the Lansing Board of Ethics, except that appointed members to other City boards, commissions, and agencies are not required to fill out the disclosure form.

It is your responsibility to fill out and file this disclosure form with the City Clerk by May 1. There are penalties stated at the end of the form for late filing. The City Clerk provides your disclosure form to the Board of Ethics.

It is then the Board of Ethics' duty and responsibility to review the disclosed information for compliance with the ethics provisions of the Charter and ordinances. The Board also performs the review to assist you in avoiding prohibited conflicts of interest.

In addition, the disclosure form is reviewed by the City Attorney for compliance with state law. Michigan statutes limit and prohibit public officers from contracting with the cities they otherwise serve. This state law is known as Contracts of Public Servants with Public Entities and is found at MCL 15.321.

Thank you for your cooperation. If you have any questions, please contact me or the Office of the City Attorney.

Sincerely,

Chris Swope
City Clerk

CITY OF LANSING
STATEMENT OF FINANCIAL INTERESTS

Basic Filing Information

Name: _____

Office or Title: _____; Reports to: _____

Address for
correspondence: _____

Phone Numbers: Daytime contact: _____; Work: _____

By my signature, I certify that the information in this Statement of Financial Interest is true and complete to the best of my knowledge, information and belief.

Signature: _____

Date: _____

Subscribed and sworn to before me this _____ day of _____, _____.

Notary Public
State of Michigan, County of _____
My Commission Expires: _____

Reserved for City Clerk's Office to Complete

Date Received by Clerk's Office _____

Clerk's Office Acknowledgement: _____

STATEMENT OF FINANCIAL INTERESTS

1. Organization and Entities: In the previous calendar year were you a part of an organization or entity other than the City of Lansing in which you are or were an officer, director, associate, partner, proprietor or employee; and, in the previous calendar year, received more than \$2,500 in income from the organization or entity?

☐ No ☐ Yes: For each organization or entity please list below and complete
"Attachment to Statement of Financial Interests"

Organization's Name	Address	Type of Organization	Your Function/Title

2. Capital Asset: Except for your personal place of residence, in the previous calendar year, were you an owner or part owner of real property, business equipment, fixtures, furniture, inventory, or other capital asset located in the City of Lansing which you disposed of and realized a capital gain of more than \$5,000?

☐ No ☐ Yes: Please complete the following:

Asset	Description

3. Governmental Employment except the City of Lansing: In the previous calendar year were you employed by a governmental unit or agency except the City of Lansing?

☐ No ☐ Yes: Please state the unit/agency, and briefly describe the nature of your duties.

Name of Agency	Duties

4. Gifts: In the previous calendar year, did you receive a gift or gifts that totaled more than \$500 or were you paid an honorarium more than \$500 in which the gift or honorarium did not come from a relative by blood or marriage or was not a campaign contribution allowed under the Michigan Campaign Finance Act?

☐ No ☐ Yes: Please complete the following:

Name of Donor	Address	Relationship to Donor

5. Business Interests and Supplemental Employment: In the previous calendar year were you or a member of your immediate family owner or part owner of a business entity (sole proprietorship, d/b/a, partnership, limited liability, company, or corporation) which conducts business in the City of Lansing other than holding stock in a public corporation?

☐ No ☐ Yes: Please complete the following and complete "Attachment to Statement of Financial Interests."

Nature of Business	Address of Business	Nature of Ownership

6. Real Estate: Except for your personal residence, in the previous calendar year did you own or have a financial interest in either real property in the City of Lansing, or real property outside the City of Lansing that has on it a drain or utility or anything else used or owned by the City of Lansing or the Board of Water and Light?

☐ No ☐ Yes: Please complete the following:

Address	Type of Ownership

7. Permit, Zoning, License Franchise: In the preceding calendar year, did you or a member of your immediate family, or a business which you are a part, apply to the City of Lansing for a rezoning, a zoning variance, a license, a permit, or a franchise?

☐ No ☐ Yes: Please complete the following and attach a copy of your application or form

Person's Name	City Action Required

Penalties for Late Filing

Annual Statements – A person who fails to file a statement by May 1 of each year shall file his/her statement on or before May 31, along with a late filing fee of \$20.00. Failure to file by May 31 is a violation of the Ethics Ordinance, unless the person has filed an extension.

New Reporting Individuals – A person who first becomes subject to the requirement to file a statement within 30 days prior to May 1, shall file his/her statement on or before May 31 without penalty. If such person fails to file a statement by May 31, the individual shall file his/her statement on or before June 15, along with a late filing fee of \$20.00. Failure to file by June 15 is a violation of the Ethics Ordinance, unless the person has filed an extension.

Extensions – A person who is required to file a statement of financial interests may have one thirty day extension by filing a notice with the City Clerk by the date on which the statement is due. Failure to file by the extended deadline is a violation of the Ethics Ordinance.

Attachment To Statement of Financial Interests

Please provide information about your employment, business, or your supplemental employment outside of your City of Lansing responsibilities. This information will aid the Board in identifying any possible conflict of interest that may arise between your employment or supplemental employment with your responsibilities as a City of Lansing official.

Therefore, please answer all the questions so the Board will have a clear understanding of the activities of your employment or business. You are not required to limit your disclosure only to the following questions. Complete this form for each business and/or employment.

1. Other than your position with the City of Lansing, in the preceeding or current calendar year were/are you employed or self-employed?

☐ No ☐ Yes: What is the name, address and form of business entity (i.e. sole proprietorship, d/b/a, partnership, limited liability company or corporation, government agency, other?)

Name of Business	Address	Form of Entity

2. In the previous or current calendar year were/are you self-employed?

☐ No ☐ Yes

3. In the previous or current calendar year did/do you own any part of a business?

☐ No ☐ Yes What is your percentage of ownership? ____%

4. Describe the nature of your business or employment. Please be specific.

5. What was or is the customer base or target audience of your business or employment?

6. Approximately how many hours a month do you spend in the business or supplemental business or employment? _____ hrs. ☐ Not city employed.

7. In the previous or current calendar year did/does your business or employer contract with the City of Lansing?

☐ No ☐ Yes. Please explain the contractual arrangement.

8. In performing your work did/do you in the prior or current calendar year use any City of Lansing facilities or equipment?

☐ No ☐ Yes. Please explain what they are and why they are being used.

9. In the prior or current calendar year was/is any of your business or employment conducted within the corporate boundaries of the City of Lansing?

☐ No ☐ Yes. Please describe what aspect of it is conducted in the City of Lansing?

10. In the previous or current calendar year did/do your business advertisements or circulars, if any, contain any reference to the City or your City employment?

☐ No ☐ Yes. Please attach copies of the ads and/or circulars.

11. Is there any additional information you wish to add that will aid the Board in its review of your business or personal activities in order to determine any possible conflict of interests?

☐ No ☐ Yes. Please explain. _____

In providing this information, the Board of ethics asks that you give special attention to the Conflict of Interest section of the Charter found at 5-505.1 – 5-505.3. A copy is enclosed for your convenience.

City of Lansing
Ethics Ordinance (excerpt)

290.08 STATEMENTS OF FINANCIAL INTERESTS.

- (a) For purposes of this Section, the following persons shall be referred to as "reporting individuals":
 - (1) Each elected officer and
 - (2) Each appointed officer, including appointed officers of the Board of Water and Light, but excluding members of boards, commissions or agencies of the city.
- (b) Each reporting individual shall file by May 1 of each year, a sworn written statement of financial interests in accordance with the provisions of this Section, unless (s)he has already filed a statement in that calendar year.
- (c) Statements of financial interest shall also be filed by the following:
 - (1) An elected officer at the time of filing her/his oath of office;
 - (2) A reporting individual whose appointment to office is subject to confirmation by the City Council at the time when her/his name is submitted to the Council for consideration;
 - (3) Any other person at the time (s)he becomes a reporting individual.
- (d) The Department of Personnel Services, the Finance Director's Office, City Council Staff and the Office of the Mayor shall cooperate with the City Clerk in notifying individuals of their obligation to file statements of financial interests and in effecting the filing of such statements.
- (e) No appointed officer or employee shall be allowed to take the oath of office or shall enter into or continue her/his duties, unless (s)he has filed a statement of financial interests as required by this Chapter.
- (f) Statements of financial interests shall contain the following information:
 - (1) The name, address, and type of organization (other than the city) in which the reporting individual was an officer, director, associate, partner, proprietor or employee, or served in any advisory capacity, and from which any income in excess of \$2,500 was derived during the preceding year.
 - (2) The identity of any capital asset, located within the City of Lansing, including the address or legal description of real estate from which the reporting individual realized a capital gain of \$5,000 or more in the preceding calendar year other than the sale of the reporting individual's principal place of residence.
 - (3) The name of any unit of government, other than the city, which employed the reporting individual during the preceding calendar year.
 - (4) The name of any person, business or organization from whom the reporting individual received during the preceding calendar year one or more gifts or honoraria having an aggregate value in excess of \$500, but not including gifts from relatives, nor a campaign contribution or expenditure required to be recorded or reported under Public Act 388 OF 1976, as amended.
 - (5) The name and instrument of ownership in any entity conducting business in the city, in which the reporting individual, or a member of the individual's immediate family had a financial interest during the preceding calendar year. Ownership interests in publicly held corporations need not be disclosed.
 - (6) The identity of any financial interest in real estate located in the city or other jurisdictions within which the city may own real estate or public utility improvements, other than the principal place of residence of the reporting individual, and the address or, if none, the legal description of the real estate, including all forms of direct or indirect ownership such as partnerships or trusts of which the corpus consists primarily of real estate.
 - (7) The name of, and the nature of the city action requested by, any person which has applied to the city for any license or franchise, or any permit for annexation, zoning or rezoning of real estate during the preceding calendar year if the reporting individual or a member of the individual's

immediate family has a financial interest in such person.

- (8) The name of any person doing independent contracting business with the city in relation to which business the reporting individual had a financial interest during the preceding calendar year, and the title or description of any position held by the reporting individual in such person.
- (g) Form for statement of financial interests. Typewritten or printed statements of financial interests are to be filed with the City Clerk the statement shall be verified, dated, and signed by the reporting individual personally. It shall be submitted on a form approved by the Board of Ethics.
- (h) Filing of Statements.
 - (1) The City's Finance Director and the Personnel Director shall certify to the City Clerk a list (current as of the prior January 1) of the names and mailing addresses of the persons who are required to file a statement of financial interests in the current year.
 - (2) The City Clerk shall, in writing, notify all persons required to file statements of financial interests under this Section. Notice shall be delivered by first class mail to the last known address appearing in city records.
 - (3) All statements of financial interests shall be available for examination and duplication by the public in the office of the City Clerk during the regular business hours of the City of Lansing, except as otherwise provided by law. Costs of duplicating the statement of financial interests shall be paid by the person requesting the duplication.
 - (4) No person shall use for any commercial purpose information contained in or copied from statements of financial interests required to be filed by this Chapter or from lists compiled from such statements.
- (i) Failure to file statements by deadline
 - (1) The City Clerk shall notify any person who fails to file such a statement by May 1 of each year, by certified mail of her/his failure to file by the specified date. Such person shall file her/his statement on or before May 31, along with a late filing fee of \$20.00. Failure to file by May 31 shall constitute a violation of this Chapter, except as provided in subsection (3).
 - (2) Any person who first becomes subject to the requirement to file a statement of financial interests within 30 days prior to May 1 of any year shall be notified at that time by the appointing or employing authority of the obligation to file and shall file his statement at any time on or before May 31 without penalty. The appointing or employing authority shall notify the City Clerk of the identity of such persons. If such person fails to file a statement by May 31, the City Clerk shall notify such person by certified mail of her/his failure to file by the specified date. Such person shall file her/his statement of financial interests on or before June 15, along with a late filing fee of \$20.00. Failure to file by June 15 shall constitute a violation of this Chapter, except as provided in subsection (3).
 - (3) A person who is required to file such statements of financial interest may have one thirty day filing extension by filing a notice with the City Clerk by the date on which the statement of financial interest is due. Failure to file by the extended deadline shall constitute a violation of this Chapter.
 - (4) A statement of financial interest is considered filed when it is received by the City Clerk.

LANSING CITY CHARTER

(excerpt)

5-505 CONFLICT OF INTEREST

.1 At least ten (10) days prior to the first of any of the events set forth in (A), (B), (C), (D), and (E) below, a City officer or employee who may derive any income or benefit, directly or indirectly, from a contract with the City or from any City action, shall file an affidavit with the City Clerk detailing such income and benefit to be derived:

- (A) The bidding of the contract;
- (B) The negotiation of the contract;
- (C) The solicitation of the contract;
- (D) The entry into the contract;
- (E) Any City action by which the City officer or employee may derive any income or benefit, directly or indirectly.

The above provisions shall not apply to individual or collective bargaining agreements pursuant to which a City officer or employee directly or indirectly receives income or benefits in the form of official remuneration as an officer or employee, or any City action pursuant to which a City officer or employee directly or indirectly receives income or benefit as a member of the public at large or any class thereof. At the first regularly scheduled City Council meeting following the filing of an affidavit pursuant to this section, the City Clerk shall notify the City Council of such filing. In particular cases and for good cause shown, the Board may waive the ten (10) day prior notice requirement contained herein.

.2 An officer or employee who has any other conflict between a personal interest and the public interest as defined by State law, this Charter, or ordinance shall fully disclose to the City Attorney the nature of the conflict.

.3 Except as provided by law, no elective officer, appointee or employee of the City may participate in, vote upon or act upon any matter if a conflict exists.



OFFICE OF THE CITY ATTORNEY



MEMORANDUM

TO: BRIGHAM SMITH, CITY ATTORNEY

FROM: JOHN M. ROBERTS JR., CHIEF DEPUTY CITY ATTORNEY

DATE: JUNE 15, 2009

SUBJECT: "POISON WORDS" OPINION

A. I think that City Attorney opinion of June 11, 2009 entitled "Disruptive Speech at Public Meetings" needs a practical (verbal at least) caution to the Council's Presiding Officer. It needs to be clear that the words are not magic grounds for expulsion from a meeting. The Presiding Officer should still, before ordering expulsion, if possible, make a record by:

1. asking the speaker to confine comments to the City business at hand, or
2. pointing out (on the record) that the speaker is being:
 - disruptive of the meeting or
 - unduly repetitious, or
3. if it is someone in the audience who is disrupting the meeting, before taking action, the Presiding Officer should state that the person was already warned against the behavior at the meeting or at prior Council meeting.

The record may help should there be a lawsuit arising from the expulsion.

B. Also, as we found out with the Timmon cases, when it is general public comment, the speaker can go pretty far with criticism of the Council/Mayor without it being a violation of first amendment. The case cited in the City Attorney opinion that deals with personal attacks is not really good law in Michigan. It is noteworthy that one's statement of opinion is not actionable defamation under Michigan law. See, *Ireland v Edwards*, 230 Mich App 607, 616-617; 584 NW2d 632 (1998).

C. See excerpt from Jonker's opinion on evaluation of actual actions in Timmon by various City Council member defendants.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHRISTINE TIMMON,

Plaintiff,

CASE NO. 5:05-CV-127

v.

HON. ROBERT J. JONKER

CAROL WOOD &
SANDY ALLEN,

Defendants.

CHRISTINE TIMMON,

Plaintiff,

Consolidated with:

v.

CASE NO. 5:06-CV-07

HAROLD LEEMAN &
KATHY DUNBAR,

Defendants.

OPINION

INTRODUCTION

Plaintiff sues under 42 U.S.C. § 1983 and claims that Defendants violated her First Amendment rights by interrupting her and terminating or truncating her commentary during the public-comment period of Lansing City Council meetings on September 12, 2005, and January 5, 2006. This is the sole remaining claim following earlier orders of the Court (docket # 56) and the U.S. Court of Appeals for the Sixth Circuit (docket #64). Defendants move for summary judgment

Defendant Dunbar

There is not sufficient evidence in the record to allow a jury to find that Defendant Dunbar acted with the intent to silence Plaintiff's viewpoint. Defendant Dunbar raised a point of order regarding the potential application of Rule 19 to Plaintiff's comments. In doing so, she acted to carry out one of her prerogatives as a local legislator. See ROBERTS RULES OF ORDER 61(d) (explaining that a councilmember may raise a point of order in response to a suspected breach of the rules of decorum). It was the responsibility of the Council President, not Defendant Dunbar, to rule on the point of order and enforce Rule 19 if appropriate. See *id.* (providing that it is the duty of the president to respond to points of order, enforce the rules, and preserve order). Defendant Dunbar did not enforce or apply Rule 19. Indeed, she could not have because that was Defendant Leeman's responsibility. She did not talk over Plaintiff or otherwise force her to be quiet or refrain from commenting. She did not silence Plaintiff's speech. She merely raised a point of order. Thus there is not sufficient evidence in the record to allow a reasonable jury to conclude that Defendant Dunbar acted to silence Plaintiff's viewpoint. Accordingly, Defendant Dunbar is entitled to qualified immunity.

Defendant Leeman

There is not sufficient evidence in the record to allow a jury to find that Defendant Leeman acted with the intent to silence Plaintiff's viewpoint. Defendant Leeman asked Plaintiff to redirect her comments to city matters. He did not rule on Defendant Dunbar's point of order. He did not enforce Rule 19. Much the way a judge, instead of ruling on an objection, might ask an attorney to rephrase a question, Defendant Leeman simply requested that Plaintiff redirect her commentary and conform to Rule 19.

Once Defendant Dunbar raised a point of order, Defendant Leeman had an obligation to do something with it. He chose to avoid, or at least defer, a ruling by asking Plaintiff to redirect her comments. He did not ask Plaintiff to stop talking; he did not tell her to sit down; and he did not remove her or otherwise silence her. Instead he requested that Plaintiff comply with Rule 19. She complied. She could have demanded a ruling on the point of order. She could have forced a ruling by continuing, without redirecting, her commentary. But she did not. As a result, there is not sufficient evidence in the record to allow a juror to conclude that Defendant Leeman acted with the intent to silence Plaintiff's viewpoint. Accordingly, Defendant Leeman is entitled to qualified immunity.

Defendant Wood

There is not sufficient evidence in the record to allow a jury to find that Defendant Wood acted with the intent to silence Plaintiff's viewpoint. She is entitled to qualified immunity because, in the course of a legislative meeting, she merely raised a point of order regarding the potential application of Rule 19 to Plaintiff's comments. Like Defendant Dunbar, Defendant Wood raised a point of order regarding the potential application of Rule 19 to Plaintiff's comments. Unlike Defendant Dunbar, Defendant Wood talked over Plaintiff and asked her to refrain from making comments about individuals, but her communication was an attempt to explain to Defendant Allen the grounds for her point of order. In raising a point of order, she carried out one of her prerogatives as a local legislator. It was the responsibility of the Council President, not Defendant Wood, to rule on the point of order and enforce Rule 19 if appropriate. Defendant Wood did not enforce or apply Rule 19. She did not force Plaintiff to be quiet or refrain from commenting. She did not silence Plaintiff's speech. She merely raised a point of order. Thus there is not sufficient evidence in the

record to allow a reasonable jury to conclude that Defendant Dunbar acted to silence Plaintiff's viewpoint. Accordingly, Defendant Dunbar is entitled to qualified immunity.

Defendant Allen

There is sufficient evidence in the record to allow a jury to find that Defendant Allen acted with the intent to silence Plaintiff's viewpoint. Defendant Allen first responded to Defendant Wood's point of order by noting that Rule 19 prohibits personally abusive attacks. Like Defendant Leeman, Defendant Allen did not rule on the point of order, and like Defendant Leeman, if this were all Defendant Allen did she too would be entitled to qualified immunity.

But unlike Defendant Leeman, Defendant Allen went on to interrupt and silence Plaintiff. A short while after Defendant Allen dealt with Defendant Wood's point of order, Plaintiff commented that Defendant Wood needed to mind her own business. At that point Defendant Allen, without making or responding to a point of order, simply demanded that Plaintiff stop talking. She commanded: "Ms. Timmon, that's enough." In doing so, Defendant Allen did not refer to Rule 19 or use language in Rule 19. This is evidence that rather than attempting to maintain decorum and apply what she believed to be a valid rule, Defendant Allen was responding to a message she did not like. This is not such overwhelming evidence of Defendant Allen's state of mind that Plaintiff is entitled to summary judgment, but it is certainly evidence on which a reasonable juror could rely to conclude that Defendant Allen's actions violated clearly established constitutional law prohibiting viewpoint-based restrictions.

There is a genuine issue of material fact. A reasonable juror could find that Defendant Allen's motive for acting against Plaintiff resulted from the content of Plaintiff's speech.

Alternatively, a reasonable juror could find that Defendant Allen was simply trying to apply what she believed to be a constitutional rule to maintain order for the efficient administration of her

legislative responsibilities. Because a reasonable juror could find either of those alternatives, neither Defendant Allen nor Plaintiff Timmon is entitled to summary judgment on the question of qualified immunity.

IV. Council Rule 19

It is understandable that the Council would want a rule like Rule 19. City councils have legitimate reasons for having rules to maintain decorum at public meetings. Indeed, the “preservation of order in city council meetings to ensure that the meetings can be efficiently conducted” is a legitimate government interest justifying rules like Rule 19. *Timmon v. Wood*, No. 06-2069, slip op. at 4 (6th Cir. June 14, 2007). But Rule 19 is a risky way of furthering that legitimate government interest. Rule 19 is easily invoked in a way that leads to at least the perception—and perhaps the reality—of an impermissible silencing of a viewpoint. Rather than invoking Rule 19 in this case, with the benefit of hindsight it surely seems more prudent for the Council to permit Plaintiff to comment without interruption during her brief allotment of three minutes. This is especially true when her comments were directed to public officials, rather than private citizens, as they were in the January 5, 2006, meeting. This would probably have generated less disruption during the meeting, and certainly would have generated less litigation after the meeting.

But a legislator, like a judge, has a need and constitutional prerogative to perform her core function without interference from other branches of government, and in particular without the threat of a potentially ruinous claim of individual liability for money damages. Indeed, this is the primary justification for legislative immunity. *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998). So in this case, despite what seems in retrospect to have been an unwise and likely unconstitutional application of Rule 19, Defendants are immune from this suit for damages because their actions

were part of the core legislative function of gathering information during the public-comment period of a regularly scheduled Council meeting.

CONCLUSION

Defendants' motions for summary judgment are granted, and Plaintiff's motion is denied. Defendants were acting within the legitimate legislative sphere when they presided over the public-comment period of the Lansing City Council meetings on September 12, 2005, and January 5, 2006. Defendants, as local legislators acting within the legitimate legislative sphere, are entitled to absolute immunity from Plaintiff's suit for money damages.

Dated: April 21, 2008

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

PRACTICE POINTS for
COUNCIL MEETINGS
- "PUBLIC COMMENT"

STATE OF MICHIGAN
COURT OF APPEALS

DORIS HOPE-JACKSON, ED. D.,

Claimant-Appellee/Cross-
Appellant,

v

SHERI WASHINGTON,

Respondent-Appellant/Cross-
Appellee,

and

WILLOW RUN COMMUNITY SCHOOLS,

Respondent.

Before: WILDER, P.J., AND SERVITTO AND STEPHENS, JJ.

WILDER, P.J.

Respondent, Sheri Washington, appeals as of right the circuit court's order granting claimant, Doris Hope-Jackson's motion to confirm an arbitration award (post-remand order) regarding claimant's defamation claim and denying respondent's motion to vacate that award. Respondent also challenges an earlier order by the circuit court vacating a portion of one of the arbitrator's previous orders (pre-remand order) that both dismissed claimant's defamation claim because the limitations period had expired and remanded for further proceedings. We affirm, in part, but vacate the portion of the arbitrator's post-remand order awarding \$140,000 in exemplary damages to claimant.

I

The instant matter arises out of a multi-count complaint by claimant, the former Superintendent of Willow Run Community Schools (Willow Run), against Willow Run and respondent, who was a school board member during claimant's tenure. Claimant made numerous allegations in lower court docket number 10-680-DC, including breach of contract, sexual harassment, and violations of the Whistleblowers' Protection Act, MCL 15.361 *et seq.*, due process, the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq.*, the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq.*, and the Elliot-Larsen Civil

DEFAMATION OF
a Public Official
on a website.

PER SE - if
lack of chastity
or a crime -
Cites - leave way
for one critical
of a
Public
official

No. 319810
Washtenaw Circuit Court
LC No. 12-001139-CZ

Generally allowing
terms as hyperbole
or exaggeration
opinion -
"crook" "steal"
"blackmailer,"
"traitor," and
"criminal
activities." ⊕

⊕ However, actual
criminal accusation
may be defamation

identity for purposes of filing the defamation claim within the limitations period and for purposes of MCL 600.5855, nothing in the "Satisfaction of Sanctions" document relinquishes a right to challenge the arbitrator's dismissal of the defamation claim on statute-of-limitations grounds. Therefore, respondent's payment of the sanctions and claimant's signature on the "Satisfaction of Sanctions" document did not amount to a waiver of the challenge to the dismissal of the defamation claim.

B

Respondent also argues on appeal that the circuit court should have vacated the arbitrator's post-remand order making several factual findings and damages awards. We disagree, in part, and agree, in part.

1

Respondent claims that the circuit court should have vacated the arbitrator's post-remand order because (a) her statements were not defamatory allegations of a crime, but rather were just hyperbole, and (b) the arbitrator found that she acted with actual malice but did not expressly address, in its opinion, that she knowingly made a false statement or made a false statement in reckless disregard of the truth. We disagree.

In Michigan, the four basic elements of a defamation claim are as follows:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Ghanam v Does*, 303 Mich App 522, 544; 845 NW2d 128 (2014).]

"A communication is defamatory if, considering all the circumstances, it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Ireland v Edwards*, 230 Mich App 607, 619; 584 NW2d 632 (1998). Under MCL 600.2911(1), statements imputing a lack of chastity or the commission of a crime constitute defamation per se and are actionable even in the absence of an ability to prove actual or special damages. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 728; 613 NW2d 378 (2000).

Moreover, "a plaintiff who is a public official may only prevail in a defamation action if he or she establishes that the alleged defamatory statements were made with 'actual malice.' 'Actual malice' exists when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth." *Smith v Anonymous Joint Enter*, 487 Mich 102, 114; 793 NW2d 533 (2010); MCL 600.2911(6).

Without the actual malice requirement, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." Whether the statements are defamatory and whether the evidence presented is sufficient to show actual

malice on the part of the defendant present questions of law to be decided by the courts. When a plaintiff who is a public official cannot show actual malice by clear and convincing evidence, the defendant is entitled to summary disposition of the defamation claim. [*Ghanam*, 303 Mich App at 531-533 (citations omitted).]

The parties do not dispute that claimant was a public official for purposes of the actual-malice requirement.

A court may hold as a matter of law that a defamatory statement is incapable of defamatory meaning. *Ireland*, 230 Mich App at 619. But questions of fact may exist regarding the statement's potential defamatory meaning. *Id.* "[E]xpressions of opinion are protected from defamation actions. However, there is no constitutional protection given to false statements of fact, so false statements of fact are not protected from libel suits." *Hodgins*, 169 Mich App at 253 (internal citation omitted). Courts recognize that "[t]echnical inaccuracies in legal terminology employed by nonlawyers," particularly when "the popular sense of a term may not be technically accurate," should not form the basis for recovery. *Rouch v Enquirer & News of Battle Creek Mich*, 440 Mich 238, 263; 487 NW2d 205 (1992).

We are mindful of the inherent imprecision of language and the difficulties this poses to any evaluation of the truth or falsity of [a statement], particularly one that rests upon the use of a word with ambiguous implications To ensure the requisite 'breathing space' for free and robust debate on matters of public concern, we think it important to allow for imprecision and ambiguity in the choice of language. [*Id.* at 263 n 25.]

Statements that cannot be interpreted as stating actual facts, such as "rhetorical hyperbole" and "imaginative expression" often found in satires, parodies, and cartoons, are protected by the First Amendment. *Hustler Magazine v Falwell*, 485 US 46, 51; 108 S Ct 876; 99 L Ed 2d 41 (1988); *Ireland*, 230 Mich App at 617. Terms such as "blackmailer," "traitor," "crook," "steal" and "criminal activities" must be read in context to determine whether they are merely exaggerations typically used in public commentary. *Greenbelt Cooperative Publishing Ass'n v Besler*, 398 US 6, 14; 90 S Ct 2d 1537; 26 L Ed 2d 6 (1970); *Kevorkian v AMA*, 237 Mich App 1, 7-8; 602 NW2d 233 (1999).

The context and forum in which statements appear also affect whether a reasonable reader would interpret the statements as asserting provable facts. Courts that have considered the matter have concluded that Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact "Indeed, the very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly." [*Ghanam*, 303 Mich App at 546-547, quoting *Summit Bank v Rogers*, 206 Cal App 4th 669, 696-698; 142 Cal Rptr 3d 40 (2012).]

If a reasonable reader would understand such words as merely "rhetorical hyperbole" meant to express strong disapproval rather than an accusation of a crime or actual misconduct, they cannot be regarded as defamatory. *Greenbelt*, 398 US at 14; *Ireland*, 230 Mich App at 618-619.

In *Ghanam*, the plaintiff claimed that statements made on an Internet message board (The Warren Forum) constituted actionable statements of fact that accused him of stealing public property. *Id.* at 525, 550. This Court held:

Review of these statements in context leads us to conclude that they cannot be regarded as assertions of fact but, instead, are only acerbic critical comments directed at plaintiff based on facts that were already public knowledge, namely the apparent misappropriation of a large amount of rock salt and the controversial purchase of additional garbage trucks. The joking, hostile, and sarcastic manner of the comments, the use of an emoticon showing someone sticking their tongue out, and the far-fetched suggestion that plaintiff somehow hid over 3,600 tons of salt near the city sports complex all indicate that these comments were made facetiously and with the intent to ridicule, criticize, and denigrate plaintiff rather than to assert knowledge of actual facts. Examination of the statements and the circumstances under which they were made show them to be mere expressions of rhetorical hyperbole and not defamatory as a matter of law. [*Id.* at 550.]

In *Hodgins*, the defendant published an editorial letter, which stated that the plaintiffs (kennel owners) would sell dogs to anyone, and then stated that some of the animals were used for dog fighting. 169 Mich App 248-250. Dog fighting and the sale of animals for dog fighting are state and federal crimes. This Court held,

This is not the same as calling someone a “blackmailer” or a “crook” in a strongly worded opinion statement. The Burgess letter’s language accuses or strongly implies that plaintiffs are involved in illegal or wrongful conduct involving dog fighting and moves across the line dividing strongly worded opinion from accusation of crime. These statements are not protected by the First Amendment from libel suits. [*Id.* at 253.]

In this case, in a November 3, 2008 article (“Google Me”), respondent wrote:

“Thank you, Google, for helping get the word out on how Doris Hope Jackson has abused her authority as superintendent; disrespecting parents to the highest degree; violated contracts and state and federal laws; threatened employees; maintained an environment where staff is punished for speaking to board members or for questioning things; hired unqualified staff and paying them at top of the pay scale; discriminated against white and black employees; reduced services to special needs students; moved teachers into positions so that they could be deemed not highly qualified and have their pay reduced; spawned the highest number of grievances and arbitrations our district has ever seen.”

Although the arbitrator found that many of the statements in that article were defamatory, it concluded that only the statement that claimant violated “state and federal laws” amounted to defamation per se.

In an August 28, 2008 article (“Have white employees been victims of reverse discrimination in WR?”), respondent wrote:

There has been a lot of talk about Dr. Jackson blatantly abusing her power and administrative authority in the district to “muscle” people out of jobs. Jackson has changed titles, given raises to some. As for others, well, she has demoted, demoralized, threatened and removed them . . . Of these horrific deeds, the most noticeable aspect is that the bad deeds have been done at the expense of white teachers and staff in the district. If Hope Jackson was a white woman, everyone in the district would be screaming bloody murder! But should these bad deeds go unpunished just because she is black? I think not! Jackson so sheepishly does her dirty work in such a way that listening to her paralyzes you, and suddenly fills you with fear . . . for your job.

Jackson needs to be reported to the federal and state authorities. Her behavior and acts are against the law. Someone, everyone needs to blow the whistle on her. Stop fearing retaliation and do something to stop this horrible behavior that the BOE obviously condones.

Jackson seems to have deep rooted issues concerning race relations. Perhaps going to an all-white school in the 60’s and 70’s left too deep a scar for her to see past her own wrong doings and mistreatments of WR staff.

The arbitrator found that respondent’s statement that claimant should be reported to the federal and state authorities because “[h]er behavior and acts are against the law” was defamation per se.

As a verbatim record of the arbitration proceedings is not required, *DAIIE*, 416 Mich at 429, the factual record considered by the arbitrator in this case is incomplete on appeal. As claimant argues, the arbitrator could have established that claimant was a public officer, see MCL 380.471a, and that the allegations that respondent made on the website about claimant’s violation of state and federal laws—when considered in light of all of her statements about claimant’s “abuse[] of authority” and the context of the website—could have amounted to a charge of misconduct in office, a felony under MCL 750.505. See *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003) (“An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance.”). Even though the forum used to make the statements was a blog, which tends to be a vehicle for expression of opinions, *Ghanam*, 303 Mich App at 546-547, the arbitrator could have concluded that this website indicated that it was providing more than just opinions—identifying itself as the Willow Run Community Action Team and taking responsibility for “Keeping Watchful Eyes on Willow Run.” The arbitrator could have also concluded that, unlike the posts in *Ghanam*, the statements were not joking or sarcastic; rather, they urged the public to contact the authorities for action. Because the circuit court could not speculate regarding the arbitrator’s mental path in concluding that the statements implied that claimant committed a crime and were not hyperbole leading to the award, and the circuit court